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No. 96-541

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

*Petitioners.*

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## APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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## APPENDIX A

[Filed Dec. 21, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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PETITION FOR A WRIT OF
PROHIBITION OR IN THE
ALTERNATIVE FOR A WRIT OF MANDAMUS

The Petitioner, Attorney General Frankie Sue Del Papa, hereby petitions this Honorable Court, pursuant to NRS 34.150, *et seq.*, NRS 34.320, *et seq.* and NRAP 21 for issuance of a Writ of Prohibition or in the alternative for a Writ of Mandamus prohibiting and/or mandating that the Respondents cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the

unlawful and unconstitutional investigation directed against the Petitioner and numerous unnamed individuals identified by Respondent Herbert F. Ahlswede, Special Master of the "Whitehead Court" (hereinafter Respondent Ahlswede), appointed by Respondent Justices on September 1, 1995.

Petitioner further requests the Court to enter an order immediately staying such proceedings pending its ruling on the merits of this petition. Petitioner alleges, as is more particularly described below, that Respondent Justices, by taking any further action in Case No. 24598 and by appointing and directing the Respondent special investigator to investigate Petitioner and others, and by proceeding with such investigation in violation of the order of a majority of this Court, are exceeding their lawful jurisdiction and that such actions are subject to a writ of prohibition. In the alternative Petitioner requests that this Court issue a Writ Of Mandamus directing Respondents cease all action in Case No. 24598 and discharge special investigator, Herbert F. Ahlswede from conducting any further investigatory or prosecutorial activities pursuant to the Respondents' September 1, 1995, ORDER APPOINTING SPECIAL MASTER.

## I. STATEMENT OF FACTS

1. On September 1, 1995, Respondents Steffen, Springer and Zenoff signed and filed an order in Supreme Court Case No. 24598, purporting to appoint Respondent Ahlswede to investigate the sources of press stories about *Whitehead v. Comm'n on Judicial Discipline*, Supreme Court Case No. 24598 and to inquire "into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system. . . . ." *See* Exhibit A attached.

2. On September 7, 1995, this Court filed a petition on the administrative docket of the court, ADKT 221, noting that there is no express authority for a panel to appoint a special prosecutor/investigator and no authority to expend

funds in this regard without a vote of a majority of the elected supreme court justices. The petition asked the Court to consider entering an order vacating the appointment of the special investigator. *See* Exhibit B attached hereto.

3. On September 15, 1995, this Court entered an order in ADKT 221 in which it found that appointment of the special master in Case No. 24598 exceeded the panel's jurisdiction and purported to authorize the expenditure of public funds. The Court further found that the appointment of a "special master/investigator" and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." *See* Exhibit C attached hereto.

The Court voided the order appointing the special master and prohibited the payment or any costs or related expenditures.

4. Respondent Justices have received a confidential document styled "MASTER'S INTERIM REPORT" in which the Petitioner and/or members of her staff are identified as having been a party or parties to "an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission," that a statement attributed to Petitioner by a former member of the Attorney General's office purportedly made by Petitioner during a staff meeting "should be explored." Respondent Ahlswede's unsupported and insupportable allegations have caused and will continue to cause Petitioner injury unless the activities of Ahlswede authorized by Respondent Justices are stayed pending a determination of the merits of this petition and relief in the nature of a Writ of Prohibition or in the alternative Mandamus is entered by this Court following a determination of the merits of this petition.

5. On December 15, 1995, the Respondents Steffen, Springer and Zenoff entered an Opinion in Case No. 24598, which adjudged an order of the Court dated September 15,

1995, to be a nullity and of no legal force or effect. *See* Exhibit D attached hereto. The September 15, 1995, order signed by Justices Young, Rose, and Shearing had rendered the Respondents' appointment of Ahlswede void. The Respondents have attempted to reinstate the unconstitutional and unlawful appointment of Ahlswede and have confirmed, adopted and unleashed the unbridled authority on the part of Respondent Ahlswede to pursue a fabricated and baseless inquisition into the legitimate functions of Petitioner's office, the constitutionally protected speech of Petitioner and of private individuals and to engage in an interrogation of the members of the Court itself.

6. The competing Orders of September 15, 1995, and December 15, 1995, entered by Respondent Justices in Case No. 24598 and by a majority of the Supreme Court have created a constitutional crisis which the Petitioner has been drawn into by reason of her office. Petitioner submits that she has standing on her own behalf as well as the status she has as the duly elected and acting legal representative of the citizen's [sic] of the State to complain of Respondents unprecedented action in commissioning Ahlswede's activities, by acting as investigators, prosecutors and judges in a single action, and by refusing to obey an order issued by a majority of the duly elected justices of this Court.

7. Any supposed leaks of information from a case which under state law and court rules should have been open to the public pales in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents.

8. The Ahlswede appointment which Respondent Justices have attempted to reinstate, in the face of a Supreme Court order signed by a majority of the duly elected justices, dissolving the appointment is symptomatic of a crisis on the court. Unless and until the lawfully constituted authority of this Honorable Court is restored to the majority of the elected

members of the Court and the conflicting orders of the Court are reconciled by the relief requested herein, Petitioner's and others [sic] rights will be violated, and subjected to conflicting and inconsistent directives concerning an extra judicial inquisitorial process.

9. Petitioner is without an adequate remedy at law in this matter. The inquisitorial process which Respondents have initiated will subject her and others to an unconstitutional and unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights. There is no forum except this Court in which the Petitioner can presently seek relief by way of prohibition or mandamus from the Respondents' abuses of power which are set forth herein. Under these circumstances, the elected members of this Court must correct the unconstitutional and unlawful investigation that Respondents have created.

## II. RELIEF SOUGHT

WHEREFORE, Petitioner prays this Court:

1. Stay all actions of Respondent Justices Steffen, Springer and Zenoff in Case No. 24598 and by Respondent Special Master Ahlswede which have been authorized by Respondent Justices pending determination of this Petition on its merits.

2. Enter an order setting an expedited scheduling order for briefing and submitting the case for decision on the briefs.

Petitioner further prays for a Writ of Prohibition or in the Alternative a Writ of Mandamus restraining Respondent Justices from taking any further action in Case No. 24598 and restraining Respondent Special Master Ahlswede from proceeding with any further activities of an investigatory or prosecutorial nature involving the Petitioner or members of her staff on the basis of the Respondent Justices [sic] order of

September 1, 1995, styled ORDER APPOINTING SPECIAL MASTER. Petitioner prays for further relief which the Court may deem appropriate in this matter.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

## VERIFICATION

STATE OF NEVADA )
) ss:
CARSON CITY )

I, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, do hereby under penalties of perjury [sic] the following is true:

1. I am the petitioner in the above-named action.

2. I have read the foregoing Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus and know the contents thereof and that the same are true of my own knowledge, except as to those matters stated to be upon information and belief, which matters I believe to be true.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

SIGNED AND SWORN TO before me
this 20th day of December, 1995, by
FRANKIE SUE DEL PAPA.

[seal]

/s/ REBA COOMBS
NOTARY PUBLIC

## STATEMENT OF ISSUES

I. Whether the Issuance of a Writ Of Prohibition Or In The Alternative A Writ of Mandamus is Appropriate in the Circumstances of this Case.

II. Whether the Duly Elected Supreme Court Justices Are Not Disqualified To Decide The Legal Issues Presented In This Petition.

III. Whether the Secrecy Orders Entered by Respondents were Illegal and Therefore, Void.

IV. Whether a Writ of Prohibition or In the Alternative, A Writ of Mandamus must be Issued to Prevent Continued Actions by Respondents in Excess of Lawful Jurisdiction.

V. Whether Respondents Have Exceeded Their Lawful Jurisdiction By Committing Extraordinary Violations Of Due Process.

VI. Whether a Writ of Prohibition Or In The Alternative, A Writ Of Mandamus Must Be Issued To Stop Respondents Steffen, Springer and Zenoff From Continuing To Defy The Orders Of The Majority Of This Court.

## POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT PROHIBITION/MANDAMUS

(Statement of Reasons Why Writ Should Issue)

The following points and authorities are respectfully submitted in support of the petition for writ of prohibition or in the alternative, for a writ of mandamus.

### I. The Issuance of a Writ Of Prohibition Or In The Alternative A Writ of Mandamus is Appropriate in the Circumstances of this Case.

This request for extraordinary relief is brought under extraordinary circumstances which justify the requested relief. A writ of prohibition will issue where a tribunal has acted without or in excess of the jurisdiction of such tribunal. NRS 34.320. *See Lane v. District Court*, 104 Nev. 427, 453, 760 P.2d 1245 (1988), *Wolzinger v. Eighth Judicial Dist. Court*, 105 Nev. 160, 773 P.2d 335 (1989). A writ will furthermore only issue when no plain, speedy and adequate remedy exists in law. NRS 32. 330. *See Wardleigh v. Second Judicial District Court*, 111 Nev. Adv. Op. 22 (March 22, 1995). The purpose of prohibition is to prevent harm which would result from the judicial actions in excess of jurisdiction. *Olsen Family Trust v. Eighth Judicial Dist. Court*, 110 Nev. Adv. Op. 69, 874 P.2d 778 (1994).

#### A. The Respondents are Acting in Excess of Their Lawful Jurisdiction.

In this instance, the Respondent Justices, by authorizing the continuing investigation by a special investigator into alleged leaks of information, is [sic] acting in excess of its jurisdiction. The elected Court has declared the investigation at an end and has declined to fund it. The persistence of the investigator in his mission, operating at the insistence of Respondents, on some unidentified source of funding, is not

only an affront to the elected court, but is an action without jurisdiction.

### B. No Plain, Speedy, Adequate Remedy Exists in Law.

This crisis will not yield to lesser measures than the order of the elected Supreme Court prohibiting the Whitehead panel's rogue mission. It is a crisis with its origins in the state's highest court; no other state tribunal may offer relief to those aggrieved. The Attorney General cannot elect any other course to protect her office from assault by the Respondents who are bent on self-vindication and retribution.

The object of the special investigator is to ferret out violators of the Whitehead panel's illegal secrecy orders for punishment. As explained, exercise of such investigative and punitive power is in excess of the Whitehead panel's jurisdiction. Writ of prohibition is an appropriate remedy to halt contempt proceedings which are in excess of jurisdiction. *See Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 560-561, 729 P.2d 1328 (1986). *See also In the Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166 (1979), *G. & M. Properties v. Second Judicial Dist. Court*, 95 Nev. 301, 304, 594 P.2d 714 (1979), *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490 (1976) ("one may not be held in contempt of a void order"), *Price v. Goldman*, 90 Nev. 299, 302-303, 525 P.2d 598 (1974) ("[p]rohibition lies to arrest proceedings in aid of a void order"), *Culinary Workers Union v. Eighth Judicial Dist. Court*, 66 Nev. 166, 170-171, 207 P.2d 990 (1949) ("when proceedings bear the threat of imprisonment of an individual for contempt of an invalid order of a lower court which order denied him constitutional and fundamental rights, the writ of prohibition is as proper as would be habeas corpus were he already in custody").

### C. Injury will Result in the Absence of the Writ.

Prohibition is appropriate to prevent "wrong, damage, and injustice likely to follow" from a court's actions in excess of its jurisdiction. *Olsen Family Trust v. Eighth Judicial Dist. Court*, _____ Nev. _____, 874 P.2d 778 (1994). Moreover, "[c]ourts are vested with great discretion as to the issuance of a writ of prohibition, and it will only issue in cases of great necessity or urgency." *Underwriters, Inc. v. Dist. Ct.*, 61 Nev. 42, 52, 113 P.2d 616 (1941). This requirement of necessity to avert harm is plainly met in this case, which presents grave violations of fundamental constitutional rights and guarantees.

Injuries which would be perpetrated by an ongoing investigation as ordered by the Whitehead panel include chilling of core First Amendment speech by a constitutional officer of the state; gross violations of fundamental due process rights held by the purported targets of the investigation; the removal of the constitutionally-required barrier between branches of government which until now has been studiously honored; and the undermining of public confidence in the competence and impartiality of the state judicial branch, which is set upon itself and others within government in an unyielding campaign of vengeance.

## II. <u>The Duly Elected Supreme Court Justices Are Not Disqualified To Decide The Legal Issues Presented In This Petition</u>.

Respondents have stated, in the order filed on December 15, 1995, that Justices Young and Rose have no authority to enter orders relating to Case No. 24598, since they recused themselves in that case.

This Petition does not place before the Court any substantive issue in Case No. 24598. Indeed all substantive issues in Case [sic] 24598 have long since been decided. That

case was concluded and a writ granted by opinions issued on September 9, 1994 and February 24, 1995. This Petition presents to this Court purely legal issues regarding the lawful boundaries of jurisdiction and judicial authority. This petition seeks to have this Court determine whether any court has the authority: 1) to bypass lawful investigative processes; 2) to appoint its own special investigator; 3) to track down the alleged violators of illegal secrecy orders, and to track down anyone who thereafter publicly criticized Respondent Justices; 4) to direct and receive secret reports from an investigator; 5) to imbue the investigator with broad powers, including subpoena power, judicial immunity and other authority; and 6) ultimately to judge and punish those persons selected for investigation. The resolution of the crisis created by Respondents may be the most significant matter which has been presented to the Nevada Supreme Court. The remaining elected justices of the Supreme Court have the obligation and sworn duty to decide this case in order to reestablish the lawful order of this Court.

## III. The Secrecy Orders Entered by Respondents were Illegal and Therefore, Void.

Upon receipt of the Whitehead Petition for Writ of Prohibition, orders were issued directing that the proceedings before the Whitehead panel be kept confidential. The effect of the confidentiality order was two fold: 1) it required that all papers be sealed and all proceedings before the panel be held in private; and 2) prohibited all parties and their counsel from making any statement about the case, including the very fact of its existence.

The Respondent Justices subsequently appointed a "special master" to investigate not only the sources of the alleged leaks to the media, but also to identify anyone who, as a result of the disclosure of the Whitehead matter, may have said anything critical about the Respondents' conduct and rulings.

A Writ of Prohibition is necessary, for Respondents are exceeding their authority by employing a "special master" to seek out and punish those who may have violated their confidentiality orders or who criticized Respondents. Respondents [sic] conduct is in excess of their lawful authority as the orders of secrecy were invalid, and therefore, void. A person cannot be punished for an alleged violation of a void order.

### A. Rule 5 of the Procedural Rules for the Nevada Commission on Judicial Discipline does not give the Whitehead panel authority to conduct secret proceedings.

Respondent Justices lacked the authority to conduct secret proceedings concerning Judge Whitehead's petition for writ of prohibition. Rather than rely on lawful authority, Respondents dismissed the notion of open and public forums by stating that the Whitehead petition had to be entertained in secret in order to maintain the confidentiality of the judicial discipline proceedings against Whitehead.

There is no rule, statute or constitutional provision which allows the Supreme Court to conduct its proceedings in secret. The only authority offered by Respondents for such secrecy was Rule 5 of the Rules for the Nevada Commission on Judicial Discipline (ARJD). ARJD 5 gives the Court no such authority, for its application is limited to preliminary proceedings before the Commission. The Judicial Discipline Commission was created by our Constitution (Art. 6, §21). The Constitution directs the Supreme Court to make rules for: "The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Art. 6, §21, 5(a) (emphasis added).

This Court has adopted appropriate rules in response to the directive of the Constitution. The scope of the rules are set forth in ARJD 1:

> These rules carry out the obligation of the supreme court of Nevada to make appropriate rules for the confidentiality of all proceedings before the Nevada commission on judicial discipline as imposed by § 21(5)(a) of article 6 of the constitution of Nevada, ...
> (emphasis added)

In that regard ARJD 5(1) states that: "All proceedings must be confidential until there has been a determination of probable cause and a filing of formal statement of charges." Rule 5(2) defines the scope of the Commission's confidentiality:

> 'Confidentiality' encompasses all proceedings of the commission and all information and materials, written, recorded or oral, received or developed by the commission in the course of its work and relating to alleged misconduct or disability of a judge.

Clearly, the confidentiality provisions contained in the ARJD's are expressly limited by the Constitution and the rules to preliminary proceedings before the Commission regarding matters pertaining to the misconduct or disability of a judge. Rules of such specific and limited scope cannot be extended by judicial fiat to allow secret petitions for writ of prohibition before the Supreme Court.

No authority has been cited in support of a secrecy order. On the contrary, the Nevada Revised Statutes, section 1.090, requires that all proceedings be held in public.

> The sitting of every court of justice shall be public except as otherwise provided by law; but the judge of any court may exclude any minor during any criminal trial therein except such minor be on trial, or when testifying as a

> witness, or when he shall be a law student preparing to apply for a license to practice law.

The undersigned is not aware of any law that would allow the Whitehead panel to hold proceedings on a petition for writ of prohibition in secret. It must be stressed that Whitehead's petition did not go to accusations against him. Rather, it sought to arrest the proceedings of a lawful judicial body (NRS 34.320). As far back as the English common law, courtroom doors have always been open to the public (Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980)), and so is the law of Nevada.

> The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.

NRS 1.030.

**B. The Orders of Confidentiality Violate the First Amendment.**

The Whitehead panel's secrecy orders violated the rights of free speech guaranteed by both the United States and Nevada constitutions.

The Whitehead panel ordered the sealing of all papers, the secrecy of all proceedings before it, and prohibited anyone from acknowledging the existence of the case. Respondents now seek to identify and punish the sources of the press stories about the Whitehead petition, and those who thereafter criticized Respondents. These actions implicate three separate First Amendment concerns. The orders denied public access to the courts and operated as a restraint on speech. The Respondents' ongoing efforts at retribution continue to chill the exercise of free speech.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> U.S. Const. Amend. 1.

The language of the Nevada Constitution is equally applicable:

> Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecution and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated.
>
> Nev. Const. Art. 1, §9.

**1. <u>Denial of Public Access to the Court.</u>**

In *Richmond Newspapers, Inc. v. Virginia,* the United States Supreme Court held that the First Amendment guaranteed that criminal trials be open to the public. "The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; ..." *Richmond Newspapers*, 448 U.S. at 577, 100 S.Ct. at 2827. As noted by Justice Stewart in his concurring opinion, these first amendment protections apply equally to

civil trials. *Richmond Newspapers*, 448 U.S. at 599, 100 S.Ct. at 2839.

While the constitutional right of public access to the courts is not absolute, the court's ability to bar public access is extremely limited.

> ... the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

*Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606, 102 S.Ct. 2613, 2621 (1982). *See also, Press-Enterprise Company v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819 (1984).

This logic should apply with equal force in the context of a petition for writ of prohibition. While it may be appropriate for preliminary proceedings before the Judicial Discipline Commission to be confidential, once Whitehead sought the power of this Court to arrest those proceedings, the right of public access far outweighed any governmental interest in secrecy.

> A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.
>
> . . . .

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

*Richmond Newspapers*, 448 U.S. at 572-573, 100 S.Ct. at 2824-2825.

**2. <u>The "gag" order and subsequent attempts to chill public comment violates the first amendment right of free speech.</u>**

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 91 S.Ct. 1575, 1578 (1971). In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535 (1978), the Supreme Court noted the line of cases which prohibited the use of contempt power to punish out of court statements.

> In a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. ... What emerges from these cases is the 'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' ... , and that a 'solidity of evidence,' ... is necessary to make the requisite showing of imminence. 'The danger must not be remote or even probable; it must immediately imperil.' ...

*Landmark Communications, Inc. v. Virginia*, 4354 U.S. at 845, 98 S.Ct. at 1544.

While the *Landmark* case dealt with attempts to punish the press as opposed to the sources of the information, the issues at play apply with equal force, for the efforts of the Whitehead panel to seek out and punish the alleged sources of the information to the press lies at the very core of the First Amendment.

> In *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966), this Court observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives "[j]udges as persons, or courts as institutions . . . no greater immunity for criticism than other persons or institutions." *Bridges v. California*, 314 U.S. 252, 289, 62 S.Ct. 190, 206, 86 L.Ed. 192 (1941) (Frankfurter, J., dissenting). **The operations of the courts and the judicial conduct of judges are matters of utmost public concern.**

*Landmark Communications*, 435 U.S. at 838-839, 98 S.Ct. at 1541 (emphasis added).

All of the Whitehead panels' [sic] orders which relate to the secrecy of the proceedings clearly violate rights pertaining to free speech. Moreover, the gag order issued by Respondent Steffen on July 22, 1993 was unconstitutionally overbroad. *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994) (Newsletter publisher could not be punished for publishing fact that he had filed a complaint with the state campaign spending

commission, the confidentiality rule was patently unconstitutional).

There can be no more compelling case for the First Amendment, freedom of speech and the public's right to know, than a case where a judge seeks to have the supreme court secretly arrest the proceedings of a lawful judicial tribunal that is considering allegations of misconduct of the part of that judge. Any such orders must be void and no one can be punished. Respondents therefore, are acting in excess of their authority and a Writ of Prohibition should issue.

## IV. A Writ of Prohibition or In the Alternative, A Writ of Mandamus must be Issued to Prevent Continued Actions by Respondents in Excess of Lawful Jurisdiction.

By order entered in ADKT 221 on September 15, 1995 (September 15th order) three elected justices of this court voided the "Order Appointing Special Master" which was entered September 1, 1995 (September 1st order) in Docket 24598. Respondents now purport to resurrect the so-called special master. Respondents' action is an unlawful attempt to exercise powers reposed in the executive branch of government, and violates the due process rights of those persons whom Respondents have targeted for investigation.

The scope of the powers and duties of the special master bestowed by the Panel in the September 1st order, which include the duty to inquire into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system, are unprecedented and unlawful. The degree of control which the Respondent Justices have over the special master is also unprecedented and unlawful. Respondents' order directs the special master to submit interim reports to them, and specifies that the special master may seek direction from Respondents at any time. Further, Respondents have declared the special master an officer and agent of the

court, with virtually unlimited powers, including the power to carry out discovery proceedings on behalf of the Respondents, to administer oaths to deposed persons, to have subpoenas issued and to have the Respondents issue orders to show cause or other orders when deemed necessary by the special master or Respondents. Finally, Respondents purport to cloak the special master with judicial immunity.

On December 15, 1995, the Respondents disclosed results of a secret investigation by their Master. Respondents' Master reported that he has investigated or suggests the investigation of numerous persons including news reporters, a "high federal prosecutorial official and of a mentioned FBI agent", the Attorney General and her office, other attorneys, judges and members of this court, all without legal authority save for the authority purportedly created by the Respondents in their September 1st order.

Initially, Petitioner points out that there is no specific authority for either the Supreme Court or the Respondent Justices to appoint a special master. However, when the rules of civil procedure do allow a **district court** to appoint a special master it is for certain limited purposes, restricted to evidence brought in by the parties or by witnesses brought before the master by effort of the parties. NRCP 53(a), (c) and (d). A reference by a district court to a master, in the language of the rule, "shall be the exception and not the rule," and may only be made during trial where matters are complicated or where exceptional circumstances exist. NRCP 53(b). The virtually boundless power which the Respondent Justices have purportedly given the special master, coupled with the duty to perform an investigation under Respondents' direct and constant supervision and control, removes the "special master" from any statutorily or judicially recognized concept of "master." Respondents [sic] order purports to imbue the special master with investigative and prosecutorial attributes that are reserved to the executive branch of government.

The power of the executive branch of government extends to carrying out and enforcing the laws enacted by the legislature. *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P. 2d 237 (1967). The power of the judiciary is the authority to hear and determine justiciable controversies. *Id.* Nev. Const. art. 3, § 1 provides:

> Three separate departments; separation of powers: The powers of the Government of the State of Nevada shall be divided into three separated departments, -the Legislative, -the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

This court has acknowledged in no uncertain terms the hazards of allowing one branch of government to usurp the power of another branch:

> The separation of powers, the independence of one branch from the others; the requirement that one department cannot exercise the powers of the other two is fundamental in our system of government. [T]here can be no liberty ... if the power of judging be not separated from the legislative and executive powers. Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.

*Galloway*, 83 Nev. at 19. The primary purpose of the special master, as expressed by Respondents, is to expose and

hold accountable sources of news leaks to the media and to punish those who have publicly criticized Respondents. Petitioner submits that the duties of investigation and prosecution, are executive in nature, and have nothing to do with the judiciary's power to hear and determine justiciable controversies. Further, Respondents lack authority to appoint an investigator for the purpose of identifying and punishing those persons whom Respondents believe have caused a public loss of confidence in the Supreme Court. Respondents' actions are beyond the powers vested in the judiciary pursuant to Nev. Const. art. 3, § 1, and are unsupported by any legislative authority. This court has so held by implication in *Dickerson v. Grand Jury of Washoe Co*, 82 Nev. 113, 412 P.2d 441 (1966) (**legislative authorization** of grand jury to investigate matters affecting health and general welfare of citizens permitted inquiry into security arrangements at state hospital).

Respondents' actions also usurp the authority lawfully reposed in other governmental entities. The Nevada Commission on Judicial Discipline exists to inquire into the conduct of judges. The Nevada State Bar exists to inquire into the conduct of attorneys. The various district attorneys and law enforcement agencies exist to inquire into allegations of criminal misconduct. Rather than allow these agencies to perform their duties, the Respondents have taken it upon themselves to perform all of these roles concurrently. Respondents' appointment of the special master to execute all of these functions, with unlimited power and the purported cloak of judicial immunity, is anathema to fundamental fairness and the constitutional protections which were intended by the Framers in providing for the separation of powers and due process of law. The Respondents' circumvention of lawful procedures and their resort to the unprecedented appointment of a special master, combined with Respondents' declaration that they will direct the control [of] the investigation and prosecution of their targets, indicates Respondents are motivated by a desire for revenge and self-vindication. Justice Steffen's comments at the December 15, 1995, hearing,

relating to clearing his name and his desire to "break noses" demonstrate that revenge and self-vindication are the true motives behind Respondents' actions.

Respondents' creation of a special master, imbued with virtually unlimited powers and authority, unconstitutionally disrupts the precarious balance of power between the judicial and executive branches. This conduct violates the admonition in *Galloway*; if "[judicial power is] joined to the executive power the judge might behave with all the violence of an oppressor". *Id*, at 19.

## V. Respondents Have Exceeded Their Lawful Jurisdiction By Committing Extraordinary Violations Of Due Process.

The situation facing Petitioner and the other unidentified targets of the probe is unprecedented. No Court in this country has engaged in proceedings of this type, reminiscent of the abhorrent "Star Chamber." The Star Chamber, characterized by secret, harsh and arbitrary proceedings, was abolished in England in 1641. The combination of investigative, prosecutorial and judicial function in one court not only blatantly violates the principle of separation of powers embodied in article 3, section 1, of the Nevada Constitution and the United States Constitution, it necessarily violates the constitutional due process rights of every individual subjected to the proceeding.

The actions and pronouncements of Respondents evidence their bias and personal motivations for self-vindication and retaliation against Petitioner and many others. To allow Respondents to continue in light of their many expressions of bias is a denial of justice.

Petitioner will only outline a few of the many indications of bias which are contained in the record in Case No. 24598. Petitioner refers the Court to the letter of

January 10, 1994, in which Respondents Steffen and Springer, declare that they have been libeled by the Las Vegas Review Journal's coverage of Case No. 24598, demand retractions and threaten to sue for damages *(see* Exhibit E, attached hereto); the statements in the order of September 1, 1995, in which Respondent's [sic] decry the criticism in the press as an outrage which "cannot be tolerated"; the statements of Justice Steffen at the oral argument in Case No. 24598 on May 20, 1995, that he has had to "pull the porcupine's quills out of his back" as a result of the unfavorable press coverage; and the statements by Justice Steffen at the hearing on December 15, 1995, that it is his desire to "pass on his good name to his children and grandchildren" and that he wanted to "break the noses" of those persons who have been critical in the press. Justice Steffen published a letter in the Las Vegas Sun, in apparent contravention of Judicial Canon 3(B)(9), decyring the "irresponsible" press that has maligned him. *See* Exhibit F, attached hereto.

The December 15, 1995, order had an "Interim Report" of the special master attached. The report was marked "Confidential." Nevertheless, Respondents Steffen, Springer and Zenoff made the report public by attaching it to their order. The release of this report, published without notice and an opportunity to be heard, constitutes a denial of the due process rights of Petitioner and others, protected under the Fifth and Fourteenth Amendments of the United States Constitution. In addition, the source of funding for the special master has not been identified. To the best of Petitioner's knowledge, Respondents Steffen, Springer and Zenoff have not followed the statutory procedure for acceptance and expenditure of private or donated funds in NRS ch. 353. If indeed the special investigator is being paid by a private individual such payments may constitute improper influence of a judicial officer prohibited under NRS 199.010 and NRS 199.020. These are not the statements or actions of disinterested and unbiased justices.

The most recently revealed incidence of impropriety and denial of due process is evidenced by a proposed order which was circulated in Case No. 24598 in or about September or October 1993. The attached press account indicates that Respondents Springer or Steffen circulated the proposed order which would have ruled in favor of the petitioner in Case No. 24598. *See* Exhibit G, attached hereto. The draft order contains a reference to an affidavit of attorney Don Nomura which was never filed with the Supreme Court, because attorney Nomura refused to sign the affidavit when presented to him by counsel for petitioner in Case No. 24598. *See* Exhibit H, attached hereto, p. 11, n. 1. This proposed order, referencing a non-existent affidavit, could only have been created following an improper *ex parte* contact with Whitehead or those working on his behalf. This incident must be referred to the Nevada Commission on Judicial Discipline for proper investigation and appropriate proceedings. In light of these pervasive and extreme due process violations, Respondents have exceeded their lawful jurisdiction.

## VI. A Writ of Prohibition Or In The Alternative, A Writ Of Mandamus Must Be Issued To Stop Respondents Steffen, Springer and Zenoff From Continuing To Defy The Orders Of The Majority Of This Court.

The actions of Respondents Steffen, Springer and Zenoff have created an unprecedented crisis. The order of December 15, 1995, states that the Respondents will ignore any order by this Court that impacts Case No. 24598. Faced with blatant disdain for the authority and processes of this Court, there is no choice but to enter a writ to end such wayward conduct.

This Court must take action to restore the orderly processes of the Nevada Supreme Court which have been so disrupted by the actions of Respondents. In the last two and a half years Respondents have needlessly expended thousands

of hours of court time, and in their zeal to exculpate themselves have interfered and continue to interfere with the work of the Court.

The Nevada Supreme Court carries one of the highest caseloads per justice in the United States. In fiscal year 1994, the filings amounted to 274 cases per justice. This is almost three times higher than the nationally accepted standard of 100 cases per justice per year.[1] The Supreme Court has an approximate annual budget of $12 million per fiscal year. *Id.* The backlog of cases before the Court exceeded 1,300 at the end of fiscal year 1994 and continues to grow.[2] These figures suggest that each case costs the taxpayers of Nevada an average of $100,000. Given the extraordinary length of time and amount of court resources that have been expended in the Whitehead matter, the cost of this litigation to the taxpayers of this state, may well be measured in millions of dollars. The Court is clearly overloaded and the Court can ill afford to waste its time and limited resources on matters of personal vindication and vengeance. No judge or panel of judges has the authority to use the resources of Nevada for such personal purposes.

The decisions of the Court affect the quality of life of all Nevadans.[3] The continuance of Respondents' costly and illegal vendetta unreasonably, unnecessarily and illegally drains the limited resources of the Court. Respondents' actions constitute a denial of justice to all Nevadans.

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[1] Remarks of Chief Justice Steffen, Minutes, Assembly Committee on Ways and Means, February 23, 1995, p. 4.

[2] Remarks of Chief Justice Steffen before the Assembly Committee on Ways and Means, February 27, 1995, p. 10.

[3] Remarks of Chief Justice Steffen before the Assembly Committee on Ways and Means, February 23, 1995, Minutes, p. 5

Petitioner is currently faced with conflicting orders from the Nevada Supreme Court. The orders entered by Respondents on September 1, 1995, and on December 15, 1995, contradict the order entered in Administrative Docket Petition No. 221, on September 15, 1995. The orders are directly at odds with each other and only one side can stand. *Battle v. Liberty National Life Ins. Co.*, 660 F. Supp. 1449 (N.D. Ala, S.D.) (permanent injunction should issue to prevent irreparable harm from potentially conflicting orders of state court); *Alonzo v. City of Corpus Christi,* 68 F. 3d 944 (5th Cir. 1995) (city could not be placed in intolerable situation of having to choose between conflicting order and statute).

As Petitioner has argued herein, Respondents have no lawful authority to appoint a special investigator and certainly no authority to declare an order of the majority of this Court to be a "nullity." This Court cannot allow any judge, or panel of judges, to exceed the proper limits of judicial authority, and to take on executive investigative and prosecutorial functions.

The Constitution and laws of the State of Nevada provide for only one Supreme Court to decide legal case [sic] and controversies. To fail to act to end this crisis would be a disservice to the citizens of Nevada.

## CONCLUSION

Based upon the foregoing, Petitioner respectfully requests the Court issue a writ of prohibition or in the alterative, mandamus against Respondents and declaring that Respondents have no authority to proceed against Petitioner or others.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

**EXHIBIT A**

[Filed Sep. 1, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

Case No. 24598

---

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

---

THE HONORABLE JERRY CARR WHITEHEAD,
*Petitioner*,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
*Respondent*.

---

ORDER APPOINTING SPECIAL MASTER

Explanatory Recitals. This order appointing a Special Master is entered pursuant to and in conformance with this court's formal opinion issued July 26, 1994, Whitehead v. Comm'n On Jud. Discipline, 110 Nev. ___, ___, 878 P.2d 913, 923 (1994), and to respond in spirit to the 1995 Legislature's Senate Concurrent Resolution No. 10.

On July 26, 1994, the Whitehead court ruled that a Special Master "be appointed by the court" and empowered by "specific order of this court to conduct such investigations

as shall be necessary to determine the sources of the unlawful breaches of confidentiality that may have occurred in these proceedings and the extent to which they may have impacted on Petitioner's due process rights."

In the Whitehead court's opinion filed February 24, 1995 (Whitehead v. Comm'n On Jud. Discipline, Advance Opinion 11, 111 Nev. _____ (1995)), the Whitehead court expressly retained jurisdiction "to carry forward and implement all determinations and rulings that we have made in the course of these proceedings or will make in the future." This appointment of the Special Master implements the earlier order of the court ordering the appointment of a Special Master and represents a continuance of the Whitehead court's jurisdiction to see all aspects of this proceeding through its finality.

On March 31, 1995, the Legislature adopted senate Concurrent Resolution No. 10, in which the Legislature proclaimed that it is "imperative that the citizens of this state have trust in and respect for the administration of the judicial system in this state" and urged the court to "consider measures" which would "foster public confidence and trust in the court system." The court respectfully honors the substance and intent of the Legislature's resolution and accepts the reality underlying the resolution, namely, that public confidence, trust and respect for this court and for the "judicial system of this state" have been brought into question as a result of the manner in which this court's decision-making in the captioned case has been negatively portrayed in the public media. We fully understand the concerns expressed by our Legislature which indeed underscore the extent of the damage to the Nevada Supreme Court and the Nevada judiciary by sources as yet unexposed, and the need to expose and hold accountable said sources as the only effective means of restoring public respect for this court and the Nevada judicial branch of government.

In issuing four major opinions and several orders in the Whitehead original proceeding for extraordinary relief, this court essentially ruled that: (1) the petitioner had been prosecuted before the Discipline Commission in a manner that was in excess of the Commission's jurisdiction; (2) it was necessary to interpret, for the first time, the Commission's procedural rules and constitutional prerogatives, which the court did; (3) the Commission must in the future abide by its rules; and (4) that the Commission could proceed in the lawful processing of the Whitehead matter pursuant to sworn complaints and in accordance with its rules and the demands of due process.

Despite the foregoing, this court has been the object of such massive and unrelenting criticism in the handling of this case as to do serious damage to the public's trust, confidence and respect for the court. Of equal or greater importance, the damage inflicted on this court by unnamed forces, has included a marked interference with the administration of justice in the above-captioned matter, a marked impact on the capacity of this court and the Discipline Commission to provide due process in said matter, and marked damage to the independence of the court system in general and the supreme court in particular.

Recognizing these facts and the most serious need for their resolution, and wishing to provide a meaningful response to Senate Concurrent Resolution 10, to "consider measures" designed, in accordance with the resolution, to "foster public confidence and trust in the court system," and to formulate a public information program which will, in part, utilize the report and recommendations of the Special Master, we issue this order of appointment in the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole.

Finally, we note that the Special Master's appointment is now more necessary than ever, because much of what has been orchestrated and perpetrated against this court and the judiciary in general is far more serious than the breaches of a lawful order of confidentiality; rather, it has amounted to clear and concerted efforts to interfere in the proper and lawful administration of justice. These powerful and covertly fueled attacks on the independence of the Nevada judiciary and the specific administration of justice cannot be tolerated.

APPOINTMENT OF SPECIAL MASTER

As stated above, the Whitehead court has previously ordered that a Special Master be appointed. In conformity with our previous order, and in response to the spirit of the Legislature's Concurrent Resolution No. 10, HERBERT F. AHLSWEDE is hereby appointed as a Special Master of the Whitehead court to act as an officer and agent of the court, in accordance with the statement of duties and powers set forth in this order. If, for any reason the said HERBERT F. AHLSWEDE is unable to continue with his duties as Special Master, the Whitehead court shall promptly appoint a successor to see that the work of the Special Master is brought to a timely and effective conclusion.

Duties and Powers of the Special Master: The duties of the Special Master of the Whitehead court shall include any and all inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the above-captioned matter and which are referred to in the recitals above. As noted previously, the Special Master shall provide special attention to the interference with the administration of justice and the breaches of confidentiality that have so seriously impacted the efforts of this court to honorably, promptly, and effectively process the above-captioned matter. The Special Master shall, after making all appropriate inquiry, file with the Whitehead court a written report and recommendation,

concerning the results of his investigatory efforts. From time-to-time the Special Master shall also file interim reports with the panel assigned to the above-captioned matter, and may at any time seek direction from said panel. The Special Master may also make recommendations as to what course the Whitehead court should take in the future to ensure continued public confidence in the Supreme Court and in the judicial system of this state.

The powers of the Special Master of the Whitehead panel of the Supreme Court shall, as an officer and agent of said panel, include, in addition to the general powers inherent in his appointment as a Special Master, the following:

1. To carry out on behalf of the panel all discovery proceedings that are provided for and authorized by the Nevada Rules of Civil Procedure and the rules of this court.

2. To administer oaths or cause oaths to be administered to all persons examined at deposition or otherwise by the Special Master.

3. To request and to have issued by the Clerk of the Supreme Court, such subpoenas and subpoenas duces tecum that the special Master of the Whitehead panel of the Supreme Court shall deem necessary to carry out the duties herein assigned to him by the court.

4. To petition the Whitehead panel of the Supreme Court, to issue orders to show cause or other appropriate orders, whenever such orders are deemed necessary by the Special Master or the panel to carry out the purposes of this order.

5. To submit vouchers to the Chief Justice on a weekly basis for approval and payment. In this regard, it is understood that the Special Master shall be paid an hourly rate

of $145, which is the same rate that Special Deputy Attorney General Donald J. Campbell received in his investigative and prosecutorial duties in the above-captioned matter. The Special Master is admonished that this panel must be mindful of costs and fees incurred in this matter and enlists the support of the Special Master in maximizing his efforts at a minimum overall cost.

Judicial Immunity. It is further ordered that in all proceedings conducted by the Special Master, the Special Master shall enjoy judicial immunity as an agent and officer of the Whitehead panel of the Supreme Court.

/s/ STEFFEN, C.J.

/s/ SPRINGER, J.

/s/ ZENOFF, Sr. J.[1]

/s/ GUY, D.J.[2]

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[1] The Honorable Thomas L. Steffen, then Vice-Chief Justice, assigned The Honorable David Zenoff, Senior Justice, to sit in the place of The Honorable Robert E. Rose, then Chief Justice. Nev. Const., art. 6, § 19; SCR 10.

[2] The Governor appointed The Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court, to sit in place of The Honorable Cliff Young, Justice, who recused himself. Nev. Const., art. 6, § 4.

*Editorial addendum: Justice Shearing has consistently opposed the appointment of a master, and in her February 24, 1994, dissent stated that she "would rescind the order appointing a master." Justice Shearing was nevertheless invited to join in this order. She declined to do so.*

cc: Frank Brusa, Chairman, Judicial Discipline Commission
Herbert F. Ahlswede
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman FitzSimmons
Peter Alpert
Gerald Stern
Leo Puccinelli
Geoffrey Giles
Guy A. Zoghby

[Filed Sep. 6, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

Case No. 24598

---

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

---

THE HONORABLE JERRY CARR WHITEHEAD,
*Petitioner*,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
*Respondent*.

---

DISSENT TO ORDER APPOINTING SPECIAL MASTER

SHEARING, J., dissenting:

This dissent is being filed separately because a copy of the Order Appointing Special Master was not presented to me until after it was filed and the opportunity to participate in any discussions regarding the order's content was foreclosed to me.

I have explained my opposition to the appointment of a special master in my prior dissents in this case. Yet, I must

dissent to this order because the order itself and the powers it confers upon the special master exceed the ostensible purpose of resolving any issues remaining in this case.

The majority of the special Whitehead panel initially sought to appoint a special master to determine how or from whom the media obtained information about the case at a time when this court had sealed the proceedings. This order exceeds that scope, ordering the master to conduct "inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the above-captioned matter."

My objections to this order are manyfold. I am astounded that the majority of the panel believes that public criticism has resulted in "a marked interference with the administration of justice" and "a marked impact on the capacity of this court and the Discipline Commission to provide due process in said matter, and marked damage to the independence of the court system in general and the supreme court in particular. Public scrutiny assists institutions in improving their ability to serve the public -- the court should welcome it! The idea that such attention hampers the court's operations and must therefore be investigated and presumably squelch-d is ludicrous and frightening. The personal discomfort of those who are the subject of criticism should not hamper either the operation or the independence of the court.

Instead of investigating how its own handling of this case could have been improved, the majority of this panel appears to have already decided that "unnamed forces" and the "massive and unrelenting criticism in the handling of this case" are the villains in the loss of public confidence. The panel majority decries "powerful and covertly fueled attacks on the independence of the judiciary and the specific administration of justice." With conclusions like these in the charging order, it is difficult to see how the investigation can possibly be objective. From these statements, it appears that the panel

majority's agenda is to search out and attack those who criticize the court.

The order purports to respond to Senate Concurrent Resolution No. 10. This panel has no business responding to a resolution directed to the duly-constituted Nevada Supreme Court. The panel was appointed for a specific purpose, namely, to resolve Judge Whitehead's petition. That matter has been resolved. Now this same panel exceeds its mandate by responding to the Nevada legislature. The panel presumes to speak for the entire court by conducting an investigation into the causes for the loss of public confidence in the court. A minority of the duly-constituted Nevada Supreme Court is usurping the responsibility of the majority of the court and spending the court's funds without authorization in the process. The Senate resolution is directed at the Nevada Supreme Court, not at a majority of a special panel of that court which excludes three members of the court.

In addition, the majority of the panel has interpreted statements of the Senate resolution out of context. The charging paragraph of Senate Concurrent Resolution No. 10 is as follows:

> RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, that the Nevada Legislature respectfully urges the Chief Justice and Associate Justices of the Supreme Court of Nevada to examine judicial accountability in this state and to consider measures to enhance the administration of the courts and foster public confidence and trust in the court system in this state.

The thrust of the charge is that we should enhance the administration of the court in order to foster public confidence, not that we should conduct a massive investigation of anyone who criticizes us.

I consider the appointment of an investigator for the purpose of making inquiry into the causes for the loss of public confidence, trust, and respect for the Nevada Supreme Court nothing short of outrageous when that investigator is specifically directed to report to and make recommendations to, not the Nevada Supreme Court, but "the Whitehead court."

I am gravely concerned about bestowing extensive powers upon a private investigator in a nebulous search for "causes of the loss of public confidence." The order seemingly subjects anyone and anything to investigation as the special master sees fit. Anyone who has ever had any dealings with the court or commented on the proceedings could be subject to investigation. The investigator is granted the full opportunity for discovery under the Nevada Rules of Civil Procedure, and subpoena power for both persons and documents. There is no indication of what protections would be available to those persons being investigated in this unique proceeding.

The panel majority warns that it will issue orders to show cause or other appropriate orders "whenever such orders are deemed necessary by the Special Master." The panel majority also grants the investigator judicial immunity. The authority of the court, let alone a special panel, to grant such immunity is itself questionable. Furthermore, granting judicial immunity is unwarranted when the investigator is not performing judicial functions. The sole purpose of the investigator is to conduct investigations outside the court. This is not a "judicial" function contemplated by our common law system. The order confers draconian powers to a private investigator with no accountability.

Since Judge Whitehead's petition has been disposed of, the only arguable ground on which the panel may retain jurisdiction is to enforce its 1993 order of confidentiality. Now the majority of the panel has indicated in its Order Appointing Special Master that enforcement of the 1993 order is no longer

important. Rather, they believe that counteracting the criticism of the court is more deserving of attention.

That the order was even issued exemplifies the reasons that public confidence in the court has waned. Therefore, I dissent.

/s/ SHEARING, J.

cc: Frank Brusa, Chairman, Judicial Discipline Commission
Herbert F. Ahlswede
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman Fitzsimmons
Peter Alpert
Gerald Stern
Leo Puccinelli
Geoffrey Giles
Guy A. Zoghby

**EXHIBIT B**

[Filed Sep. 7, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

ADKT 221

---

PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

---

PETITION

COMES NOW, Vice Chief Justice Cliff Young and Justices Miriam Shearing and Bob Rose and request that the Nevada Supreme Court enter an order canceling the appointment of the special master made by order entered September 1, 1995, to investigate the reason for the negative press and the source of breaches of confidentiality that occurred in the case of Whitehead v. Comm'n on Jud. Discipline (110 Nev. 128, 869 P.2d 795 (1994); 110 Nev. 380, 873 P.2d 946 (1994); 110 Nev. 874, 878 P.2d 913 (1994); 111 Nev. 70, 893 P.2d 866 (1995)), and that any expenses for the appointment of said special master/prosecutor be declared improper and incurred without authority.

The undersigned believe that the order appointing a special master/prosecutor filed September 1, 1995, signed by Chief Justice Thomas Steffen, Justice Charles Springer, Senior

Justice David Zenoff, and District Judge Del Guy, four of the five members of the Whitehead panel, was done without legal authority and that the panel cannot authorize the public expenditure of money to finance the special master/ prosecutor's activities. This appointment and attempted expenditure of funds is improper and without legal authority because:

1. There is no express authority for a panel to appoint a special master, which is really the appointment of a special prosecutor to investigate and report breaches of confidentiality and what is called the interference with the administration of justice because the Whitehead panel received adverse publicity. The panel cites one of its own opinions issued a year ago for authority to appoint a special master. However, a court or panel cannot create jurisdiction when none originally existed. Cf. KDI Sylvan Pools v. Workman, 107 Nev. 340, 343, 810 P.2d 1217, 1219 (1991). Further, Senate Concurrent Resolution No. 10 gave no express or implied authority for the panel to launch a new program with public funds. The resolution simply urged this Court to promote trust and confidence by espousing openness, access to court information, and judicial accountability. The appointment of a special master/prosecutor to launch a new court activity with public funds was beyond the jurisdiction of the Whitehead panel.

2. Even if such legal authority exists, the appointment must be authorized by at least three of the elected five Supreme Court Justices. Rule 7 of the Supreme Court Rules states that court administration and the authority to spend money is controlled by a majority of the Court. It expressly states that the Court and Chief Justice shall be "bound by any decision or order that may be entered by a majority of the Court." SCR 7(4). A majority of the Court does not favor the appointment of the special master/prosecutor or the expenditure of unauthorized funds to support the special master/ prosecutor's activities.

3. The Legislature did not authorize the expenditure of money on a special master or prosecutor, and no such request to fund this investigation was made to the Legislature by Chief Justice Steffen or Justice Springer; and even if the funds were appropriated for this purpose, the approval of three elected Justices of the Nevada Supreme Court is required before funds in the Supreme Court budget can be expended as previously stated.

4. We question the wisdom of spending a substantial amount of money attempting to identify the breaches of confidentiality or "leaks" and the reason for the adverse press that occurred in the Whitehead case. A special master does not have to be appointed to determine why the Whitehead panel has received substantial criticism--it is the action and opinions of the panel itself that drew the great adverse reaction and comment. The opinions issued by the panel have been extremely critical of the Nevada Judicial Discipline Commission, its former chairman Guy Shipler, its former counsel attorney Don Campbell and Attorney General Frankie Sue Del Papa, and individual members of the Nevada judiciary, and the appointment of a special master/prosecutor will be viewed as a retaliatory effort against those individuals and authorizing a "witch hunt" of everyone who has opposed the activities and opinions issued by a majority of the Whitehead panel.

Identifying the individual or individuals who breached confidentiality seems remote, and the undefined duties of the special master/prosecutor can lead to an abuse of power and more adverse publicity. Rather than restore confidence and trust in the Nevada judiciary, the operation of this special master/prosecutor will do just the opposite, and the appointment already gives the appearance of being a vindictive and vengeful act by the majority of the Whitehead panel.

WHEREFORE, petitioners Vice Chief Justice Cliff Young and Justices Miriam Shearing and Bob Rose request that a public hearing on this ADKT be held at noon on

September 15, 1995, or as soon thereafter as possible, to consider entering an order vacating the Whitehead panel's order appointing special master/prosecutor filed September 1, 1995, and prohibiting the payment of any cost or expenditure associated with the appointment of said special master/ prosecutor. The Clerk of the Court is directed to schedule and notice this public hearing.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

**EXHIBIT C**

[Filed Sep. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

ADKT 221

---

PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

---

ORDER GRANTING PETITION AND
VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead vs. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/prosecutor's activities. This order was entered by a majority of the panel constituted to hear and decide only the Whitehead matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees with it. SCR 7(8). The Whitehead court issued its final decision in this matter on September 9, 1994. See Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 n.1 (Adv. Opn. 11, February 24, 1995). The "order Appointing Special Master," was entered one year after entry of judgment in that matter "In the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole." (Emphasis in the original.) The undersigned, a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources. We therefore declare void the "Order Appointing Special Master" entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

**EXHIBIT D**

[Filed Dec. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

Case No. 24598

---

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

---

THE HONORABLE JERRY CARR WHITEHEAD,
*Petitioner*,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
*Respondent*.

---

Original proceedings; declaration and judgment invalidating unlawful attempt to interfere with jurisdiction of this panel.

Judgment declaring three-justice order a nullity.

Ohlson & Sringgate, Reno; Hamilton & Lynch, Reno; Gentile and Porter, Las Vegas; Laura Wightman FitzSimmons, Las Vegas,
for Petitioner

Leonard I Gang, Carson City,
for Respondent

Peter Alpert, Las Vegas; Gerald Stern, New York,
for Amicus Curiae Association of Disciplinary Counsel.

Leo Puccinelli, Elko,
for Amicus Curiae Ad Hoc Committee for the Preservation of an Independent Judiciary

Geoffrey Giles, Reno,
for Amicus Curiae American Judicature Society

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OPINION

PER CURIAM:

The following opinion and judgment of the court constitutes an unprecedented but necessary response to a certain document filed by the dissenting justice and two disqualified justices in one of the court's administrative files on September 15, 1995. The document in question purports to be an "order" declaring actions of this court to be "void," and otherwise overruling substantive rulings of the constitutionally-empaneled court sitting in this case. Because two of the justices who signed the mentioned order were disqualified to act in this case, because notice and due process were denied to both parties to this action, the Judicial Discipline Commission and Judge Whitehead, and because the mentioned justices are in a position of conflict of interest, the

"order" appearing in the form of the mentioned administrative document must be declared null and of no force or effect.

On September 15, 1995, the dissenting justice, Justice Shearing, and the disqualified justices, Justices Young and Rose, signed and filed an "administrative" document that bears the title, "Order Granting Petition and Vacating Order Appointing Special Master[1]." The referenced document purports, unlawfully, to nullify and set aside a previous judgment of this court granting a motion filed by petitioner Whitehead. This court ruled in July, 1994, as follows:

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

The September 15, 1995 document purports to overrule the decision above-quoted, and, additionally, purports to "declare[] void the 'Order Appointing Special Master' entered in Docket No. 24598" (the above-captioned matter). Neither counsel for the Commission nor Judge Whitehead was given any notice or the due process right to be heard prior to the signing and administrative filing of the mentioned "order" which purports to contravene the "law of the case" in this matter and to declare vital aspects of the decisions of the

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[1] A copy of the subject order is attached to this opinion.

Whitehead court to be void. In addition to the other infirmities inherent in the September 15 document, the signing justices are in a position of conflict of interest, which prevents them from acting to stop the investigation in progress at the time the September 15 document was filed. (See Master's Report attached and made a part hereof.)

In addition to filing the subject September 15 document, the two disqualified justices (Justices Young and Rose) have recently announced their intention to go beyond merely declaring the appointment of the special master void in this case. Justices Young, Rose and Shearing have recently announced their intention to sign, on December 15, 1995, another similar administrative "order", at another "administrative conference," in which the three justices propose to declare "that the authority and existence of the Whitehead panel be terminated formally to end the existence of a legal body whose time has come and gone."

In sum, then, the dissenting justice, Justice Shearing, and the two justices who were heretofore disqualified from sitting in this case, Justices Young and Rose, have, without any authority for doing so, signed an "administrative" order that pretends to reverse and invalidate significant rulings of the Whitehead court. The same three justices have recently announced their intention to sign another similar "administrative order" which would purport to disband and terminate "the authority and existence" of the court as constituted in this case. The only basis presented by Justices Young, Rose and Shearing for their attempts to reverse the judgment of the court is their unsupported (and unsupportable) statement that this court's orders relative to the appointment of a master were in some unstated way, "done without legal authority." The stated reason for trying to dissolve this panel of the court is that the existence of the panel should be terminated because its "time has come and gone."

There is no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case. It would be idle for anyone to argue that disqualified justices have the legal power or authority to countermand a duly-entered judgment of this court under the guise of some supposed right inherent in their being elected members of the court. It is equally obvious that if the "order" of September 15, 1995, signed by Justices Young, Shearing and Rose had any conceivable legal effect (as it clearly does not), such an order would be clearly violative of the parties' due process rights to notice and the opportunity to be heard. Seeing no need for further discussion of this matter, the court enters the following judgment:

1. The order signed by Justices Young, Shearing and Rose, filed on September 15, 1995, which declares certain judgments and orders of this court to be "void," is hereby adjudged to be a nullity and of no legal force or effect.

2. Any attempts by the dissenting Justice Shearing or by the disqualified Justices Young and Rose, by way of "administrative conference" or otherwise, to "terminate" the existence of the Whitehead court, as constitutionally empaneled in this case under Article 6, Section 4 of the Nevada Constitution, are clearly beyond the authority of the mentioned justices, individually or as a group of three, and such attempts must be and will be ignored by the court as it is presently legally and constitutionally empaneled.

3. The order of September 1, 1995, appointing Herbert Ahlswede as special master, remains in full force and effect as it was at the time of its filing.

/s/ STEFFEN, C.J.

/s/ SPRINGER, J.

/s/ ZENOFF, Sr. J.[1]

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[1] The Honorable Thomas L. Steffen, Chief Justice, who was then Vice-Chief Justice, assigned the Honorable David Zenoff Senior Justice, to sit in the place of the Honorable Robert E. Rose, Justice, who was then

[Filed Sep. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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ADKT 221

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PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

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ORDER GRANTING PETITION AND
VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead vs. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/ prosecutor's activities. This order was entered by a majority of the panel constituted to heal and decide only the Whitehead matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our

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Chief Justice. Nev. Const., art 6 § 19; SCR 10.

administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees with it. SCR 7(8). The Whitehead court issued its final decision in this matter on September 9, 1994. See Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 n.l (Adv. Opn. 11, February 24, 1995). The "order Appointing Special Master," was entered one year after entry of judgment in that matter Win the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole." (Emphasis in the original.) The undersigned a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources We therefore declare void the "Order Appointing Special Master" entered in Docket No 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

[CONFIDENTIAL]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 24598

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IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

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THE HONORABLE JERRY CARR WHITEHEAD,
*Petitioner*,

vs.

NEVADA COMMISSION OF [sic] JUDICIAL
DISCIPLINE,
*Respondent*.

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# MASTER'S INTERIM REPORT

Pursuant to an order entered by the above-entitled court September 1, 1995, appointing Herbert F. Ahlswede Special Master of the Whitehead court, and requiring him from time-to-time to file interim reports with the Whitehead panel concerning his investigation, the following report is hereby submitted:

1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission.

2. My investigation to date reveals that this disclosure may involve members of a law firm, at least two members of the supreme court and the attorney general's office. My investigation, to date, does not point to the involvement of any members of the Discipline Commission, but I do not foreclose the possibility of this being the case should my investigation be permitted to continue.

3. The evidence gathered to date discloses a flurry of communication among those aforementioned persons and those involved in the confidential breach at and around the time of the first "leak," October 10, 1993, when "unnamed sources" were reported to have revealed the confidential files relating to Judge Whitehead to an investigative reporter for a Las Vegas newspaper. The evidence, in the form of communications by FAX and telephone and telephone messages, reveals that possibly at least one member of the supreme court, presently unidentified members of the attorney general's office who were FAXing Whitehead materials to the law firm, members of the law firm, an investigative reporter for the Las Vegas newspaper, a reporter for a Reno newspaper, and an attorney who was representing the Discipline Commission, were involved in a conspiracy to unlawfully leak confidential information concerning the Whitehead investigation by the Discipline Commission.

4. My investigation discloses that evidence of the aforementioned communications, i.e. the telephone FAX records and telephone messages, were ordered destroyed at a time when it appeared that these records might be discoverable in any subsequent investigation into the source of the leaks. Notwithstanding the destruction order, those documents have

been obtained. They appear related to the leak of confidential information.

5. I have also been made aware of a letter from a former member of the Attorney General's office indicating that the Attorney General told an assemblage of her deputies (including the author of the mentioned letter, in her Las Vegas Office, that "[Senior Justice] Zenoff's appointment [to the Whitehead panel] proved that 'the fix was in.'" I can think of no more serious charge than that of a "fixed" court. Certainly, if the statement was made by the Attorney General, and it had any substance, she had the absolute duty to prosecute any so-called "fixed" members of the supreme court. The making of such a statement by the Attorney General and her reasons for making such a statement should be fully explored.

Please keep in mind that this is only an interim report and not a final one. My investigation had just begun when Justices Young, Rose and Shearing ordered it terminated, before any conclusionary or final report could be submitted.

Because my investigation is not complete and because I still harbor some hope that I might be allowed to continue in the search for truth, I offer to the court the present, necessarily incomplete report, which has not included the names of those persons who may be involved.

My investigation cannot be considered any where near complete until I complete my intended work, which includes at minimum, the following:

1. Taking the deposition of certain clerical personnel and lawyers of the law firm involved.

2. Ascertaining who was faxing papers from the attorney general's office to the offices of the law firm involved.

3. Taking the deposition of all supreme court justices and some district court judges.

4. Examination of various involved law firm's records, including, at minimum, inspection of the computers used in the writing of documents and memoranda relating to the Whitehead case.

5. Examination of Supreme Court telephone and fax records

6. A potential request for a federal inquiry into the influence that certain members of the law firm claim to have over a high federal prosecutorial official and of a mentioned FBI agent.

At the time that Justices Young, Rose and Shearing signed the order purporting to terminate my authority, my next intended order of business was to interview all five of the supreme court justices. It was a matter of shock and outrage to me when I found that two of the justices who had signed the order were disqualified to act in the matter in which I had been employed.

Recently, the same three justices (two of whom have been legally disqualified to act in any manner in the Whitehead case) have announced their intention to sign another three-justice order which would terminate entirely ongoing proceedings in a pending case. I realize that the three justices believe that the "time has come and gone" for the existence of the legally constituted panel in the Whitehead case. Nevertheless, it is beyond my understanding how this case can be extinguished by a stroke of the pen, particularly when it is the pen of jurists who are legally disqualified to act in this case.

I dread to think of the precedent that this action takes, for I assume, in the future, any time that three elected justices

deem the manner in which a panel handling a case is unsatisfactory to them, they will try again to wipe it out of existence.

Respectfully submitted,

/s/ HERBERT F. AHLSWEDE
Special Master

SPRINGER, J. concurring:

I concur in the judgment of the court and point out that there are clearly a number of irrefutable legal reasons why two disqualified justices cannot be allowed to intervene in a case through the guise of an "administrative conference" and start canceling out the decisions made in a case and controversy in which they were disqualified to sit. I will supply these legal reasons later, but at the outset I want to stress only the common sense aspects of this case, for I am confident that any reader of this opinion, lawyer or layperson, will understand, before I write another word, that a case duly decided by this court cannot properly be reversed or set aside by any combination of dissenting and disqualified justices who claim jurisdiction simply by changing their roles from judicial to administrative.

By way of simple illustration, consider a hypothetical case decided by a district judge who later discovers that his predecessor, who was expressly disqualified in the same case, had signed and filed in that case an "administrative order" declaring the judgment entered by the duly-appointed successor judge to be "void". It seems odd to contemplate any judge engaging in such untoward conduct, but the fact of the matter is that we are now faced with similar conduct being engaged in by three members of this court.

I think of a number of supreme court cases that have been decided by a panel of five jurists in which two of the panel members are district judges who have been constitutionally designated to "sit in the place" of disqualified justices. If these three justices were now permitted to set aside the judgments of this court merely by signing an in-chambers, "administrative" order, dissenters in any case could simply join with the disqualified justices in an "administrative conference" and overrule any case and controversy that was not to their liking. Thus, if the actions taken by the three justices in this matter are allowed to stand, any future decision of the court

in which jurists were substituted for disqualified supreme court justices is in jeopardy. Such an action would disregard stare decisis and predictability in the law, and any case or controversy decided by a duly-constituted panel of this court would be subject to an overruling by a majority of three assembled in an "administrative conference" set at their pleasure. The rule of law would thus, in such cases, be supplanted by the preferences of disqualified jurists who, in the exercise of raw power could overrule decided cases at will.

In the above example of a district judge discovering that a previously-disqualified judge had filed an order superseding the lawful judgment of the court and declaring the court's judgment "void," there would at least be a remedy--the supreme court would, posthaste, cancel out such an attempt by a disqualified judge to reverse a legal decision of the court. There is, unfortunately, no one to appeal to when justices of the supreme court act in this way.

There is, of course, absolutely no legal basis for the action taken by Justices Young, Rose and Shearing. In addition to the invalidity of the subject order based on the disqualifications of Justices Young and Rose to sit in the Whitehead case, as noted previously, the "order" has denied notice and the opportunity to be heard to Petitioner Whitehead and the Commission. The fugitive "order" is also in violation of established court rules. Finally, and very importantly, at least one of the three justices is the subject of the Special Master's inquiry.

At this juncture, I think it is important for the reader to understand more fully the actions of this court which the three justices seek to declare "void." It should first be said that the decision of the Whitehead court that Justices Young, Rose and Shearing have attempted to declare "void" is the court's duly-entered order of February, 1995, which granted Judge Whitehead's motion to appoint a master. The motion was vigorously opposed and was the subject of oral argument

to the court. The issue decided by the Whitehead court was whether inquiry should be made into the breaches of confidentiality that had been occurring in the Whitehead case. The issue was so serious that even the Nevada District Judges Association wrote an unsolicited letter to then chief justice Rose urging that he take measures to "investigate the source of these [confidentiality] violations of state law and to take whatever steps are necessary to put a stop to the practice."

Article 6, section 21(5), of the Nevada Constitution provides: "The supreme court shall make appropriate rules for: (a) The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Following the stated constitutional mandate, this court adopted rules relating to confidentiality, which provide in ARJD 6 that any "person who breaches the confidentiality of judicial discipline proceedings is subject to being found guilty of contempt of the supreme court." Each member of this court has sworn an oath to "support, protect and defend the Constitution of the State of Nevada."

The Commission on Judicial Discipline commenced its activities in 1977. Approximately two years after it came into existence, the Commission began the practice of releasing confidential information relating to judges in a manner that was violative of the Constitution and Commission rules of procedure. These unlawful practices were discontinued in the 1980's but resumed in the 1990's, accompanied by another unlawful practice, that of making secret agreements with judges and imposing secret punishments that were in violation of the constitutional provision quoted above.

I do not understand why the Commission has persisted in violating the Constitution by permitting confidential material to be released to favored press sources and by imposing secret punishments upon judges. Judges who have been the victims of these practices suggest that those responsible for these

unlawful actions believed that they were enhancing their own power by currying favor with certain influential media sources and by holding over the heads of judges the threat of public disgrace if judges resisted too strongly the will of the Commission.

Before Judge Whitehead filed his challenge to illicit Commission practices, the members of this court were already aware of a number of constitutional violations being engaged in by the Commission. In one case, during confidential proceedings relating to a rural judge, the judge became the object of press accounts which alluded to supposed secret sources within the Commission itself. These planted news stories falsely attributed unfounded charges of sexual harassment and other sexual misconduct to a judge. Other comparable misuses of the system had been called to our attention by outraged judges; and, as a result of these revelations, some members of the supreme court became very much concerned about what the Commission was doing.

The constitutional violations that emerged in the Whitehead case (putting confidential Commission files into the hands of a friendly "investigative reporter") were merely the culmination of similar events in the past and inarguably the most brazen and destructive instances in the chain of constitutional violations. The Commission is the legally-designated custodian of these records, and escape of these records was becoming more the rule rather than the exception. It also became apparent that certain reporters, particularly certain members of the Capitol press corps, were more favored than others and that there was, perhaps, an organized scheme to avert constitutional confidentiality provisions entirely.

Judge Whitehead moved this court to appoint a master to investigate violations of his right to confidentiality and other claimed constitutional violations. Records in the Whitehead case revealed not only that confidential information was being

unlawfully planted with favored media outlets, it also disclosed Commission practices in which judges were coerced into making secret "agreements" with the Commission that resulted in the imposition of punishments that were never made known to the public. Notable among these secret punishments was the practice of putting judges on "probation" to the attorney general's office, a practice which resulted in judges having to make rulings in cases where their "probation officer" from the attorney general's office was appearing before them as counsel.

The manner in which the Discipline Commission has been conducting its business presents a very serious threat to the independence of the Nevada judicial system; and it is primarily this concern that prompted this court to institute an inquiry into the practices described above. Contrary to the position taken by certain elements of the media that have been closely involved with the mentioned practices, the purpose of this court's appointing a master is neither to investigate the press nor to exact "vengeance" against anyone for embarrassing the court or its members. I cannot fault responsible members of the press for faithfully and accurately printing contraband material that was delivered to it by persons who were willing to violate the Constitution and laws of this state.

It was the concern of a majority of the Whitehead panel (as it should be for all members of this court) that the mentioned unlawful practices appeared to be carried out in such a way as to degrade the courts, the judges and the Commission itself, and that judges at all levels of our court system were being denied due process of law. Moreover, the public was being denied the open processes of judicial discipline proceedings that the Commission's own rules expressly required.

Returning now to the issue at hand, and although it is certain that under no conditions could the three justices have assumed lawful jurisdiction to overrule any aspect of the Whitehead decisions, very little argument is required to show

that the Judicial Discipline Commission and Judge Whitehead had to have received notice and the opportunity to be heard before the substantial rights of the parties could be altered.

I would not venture to say whether the Discipline Commission would now be in favor of a continued investigation of the violations of law that took place in the Whitehead proceedings; but certainly the Commission should have been given notice and an opportunity to be heard before any action was taken by this court or by any individual justices.

The motion by Judge Whitehead to appoint a special master was granted by four of the five members of the Whitehead court. The judgment has long since been final and is not subject to challenge. The idea that Judge Whitehead could be lawfully deprived of his rights through some kind of ersatz, "administrative" machination, involving two disqualified justices and a dissenting justice, is at total odds with any known conception of jurisdiction, fairness and due process.

There is a third reason, aside from the disqualification of Justices Young and Rose and the due process considerations discussed above, why the three justices should not be allowed to thwart the investigation commenced by Special Master Herbert Ahlswede. The reason is that evidence gathered in the Master's preliminary investigation by the Special Master (before Justices Young, Rose and Shearing stopped him) points reliably to the possibility that at least one of the justices who signed the order may be involved in the breaches of confidentiality which are the subject matter of the investigation. In other words, it appears as though some of the justices may possibly be trying to put a stop to an investigation in which they themselves might be the targets.[1]

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[1] It is noteworthy that in her dissent in this case, Justice Shearing wrote that "there is evidence that some of the [unlawful] disclosures may have come . . . from the court itself. (Emphasis furnished.)

Although Justices Young, Rose and Shearing have signed an order purporting to put a stop to Mr. Ahlswede's investigational activities, Mr. Ahlswede did have time, before the justices were able to thwart the investigation, to gather some vital documentary evidence and take some witness statements. From the information provided by Mr. Ahlswede to the Chief Justice, it can now be said with confidence that the investigation was clearly on its way to the discovery of information that would be of exceptional interest to the judiciary and to the public. It is now established beyond question that the Special Master's investigation was anything but an unfounded "witch hunt," as it has been described by Justices Young and Rose. Among other significant discoveries by the Special Master, the identity of some of the persons responsible for the breaches of confidentiality have been discovered, and there is every promise of discovering all of the persons who engaged in what appears from presently available data to have been a deliberate conspiracy by a number of persons to violate the constitution and laws of this state.

Because the Special Master's investigation is not complete and could be impeded by a premature release of the identity of any of the persons being investigated by the Special Master, I say no more about the investigation at this juncture. Suffice it to say for present purposes that two of the three justices who signed the September 1 order were themselves the subject of the investigation that these justices have ordered to be stopped. Even if these justices had had the authority to intervene in this case and the power to countermand the orders and decisions of this court, it would be a clear conflict of interest for them to order the cover-up and stoppage of an inquiry which tragically appears to involve one or more of the justices themselves.[2]

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[2] It should be noted that as independent grounds (in addition to the jurisdictional, disqualification, due process and conflict of interest reasons)

In conclusion, then, because: (1) Justices Young, Rose and Shearing have no jurisdiction to set aside the rulings of this case; (2) Justices Young and Rose are disqualified to act in any way that relates to this case; (3) the "order" declaring decisions of the Whitehead court in this matter void constitutes a clear denial of due process to the parties to this litigation; and (4) actual conflicts of interest prevent Justices Young, Rose and Shearing from acting in any way that would thwart the Special Master's investigation, I concur in the judgment of the court.

/s/ SPRINGER, J.

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for setting aside the subject order of September 15, 1995, Justice Rose (who was chief justice during the pendency of the Whitehead case) and Justice Young (who was and is Vice Chief Justice during the pendency of the Whitehead case) are precluded from taking any action that relates to the Whitehead matter by SCR 7(5) which provides: "In the event the Chief Justice or the Vice Chief Justice is either disqualified or wishes to recuse himself in regard to the decision of any litigated matter, he is also precluded from undertaking any administrative action with regard thereto. (Emphasis added.)

Further, NRS 2.140 provides that the transaction of judicial business of the supreme court requires "the concurrence of three justices who heard the argument." Justices Young and Rose, disqualified from the Whitehead case, obviously are not justices "who heard the argument" in the Whitehead matter; therefore they are barred by NRS 2.140 from transacting any business relating to that case.

**EXHIBIT E**

LAW OFFICES OF
JAMES E. WILSON, JR.
301 W. FOURTH STREET
CARSON CITY, NV 89703

(702) 882-9211
FAX: (702) 883-5827

January 10, 1994

Sherman Frederick, Publisher
Las Vegas Review-Journal
1111 West Bonanza Road
Las Vegas, NV 89106

Dear Mr. Frederick:

This letter is directed to you on behalf of two justices of the Nevada Supreme Court, Charles E. Springer and Thomas L. Steffen. The purpose of this letter is to demand, pursuant to NRS 41.336, that you correct the libelous statements about the named justices published in your newspaper and which I shall hereafter identify at least in part.

Before going into specific instances of defamation, permit me to give you a summary of my position:

1. Legal precedent and court rule (Administrative and Procedural Rule 40(7)) permit and expressly authorize a judge or the Commission to seek the kind of judicial review now being sought by the judge in the Supreme Court.

2. That the reviewing court should hold administrative proceedings of the Discipline Commission in abeyance until judicial

review is completed is the proper, ordinary and accepted manner of proceeding in cases such as this.

3. That the Supreme Court and the Commission had the constitutional and legal duty to keep these judicial discipline proceedings confidential, at least until after probable cause for disciplinary charges was established, is not a matter that can be seriously challenged.

4. A majority of this court (Justices Rose, Steffen and Springer) were acting in complete accordance with the law and the Nevada Constitution when they:

a. ordered the Commission not to proceed until the judicial review of the Commission's jurisdiction was completed.

b. ordered that all proceedings be confidential.

5. The preliminary ordered signed by Justices Steffen and Springer and referred to in your articles and editorials were procedural and non-final in nature. These orders were later ratified or allowed to stand by a majority of the court.

6. Any statement, implication or innuendo that insinuates any impropriety or irregularity into the judicial acts performed by Justices Springer or Steffen is necessarily and indisputably false and incorrect. Not only have Justices Steffen and Springer not wrongfully "interfered" with the judicial discipline process,

to date everything they have done was commanded by the Nevada Constitution and law--they had no choice and were doing what they had to do under the circumstances.

7. Undeniably, the "picture" drawn by your newspaper of Justices Steffen and Springer over the past three months can be summarized in this way:

*Justices Steffen and Justice Springer are corrupt judges who have abused their judicial trust and have violated the law and the Nevada Constitution by wrongfully and "secretly" thrusting themselves into the lawful proceedings of the Judicial Discipline Commission and by engaging in unethical "favoritism" to prevent a powerful "crony" from receiving his just and due punishment for judicial misconduct.*

8. The statements made by the Review-Journal and the overall picture drawn by the Review-Journal are false, defamatory and malicious. It is these falsehoods and these false portrayals of Justice Steffen and Justice Springer that we demand be corrected.

Beginning on October 10, 1993, in an article bearing the headline "State Supreme Court secretly halts probe of Washoe judge," and continuing on through the end of 1993, your newspaper has carried an intensive series of articles and editorials which defame and place in a false light justices of the Nevada Supreme Court, Charles E. Springer and Thomas L. Steffen. Left for another time is the subject of the damage your newspaper and its secret sources have done to the Nevada Supreme Court, the judiciary in general, and the judicial process with respect to the subject of your reporting and editorializing.

On behalf of the justices, I demand correction of the following statements, but emphasize that this demand is not to be construed as and "all or nothing" demand. In other words, we demand a correction on each of the following statements and leave to you and your counsel the responsibility of deciding which of the statements you will be willing to correct.

1. "The press association plans to file a complaint over a secret ruling halting a hearing against a judge." "The Nevada Press Association plans to file a complaint challenging a secret state Supreme Court ruling that halted a disciplinary hearing against a Reno judge." "The complaint will be filed with the state Judicial Discipline Commission which was prevented from holding hearings on Washoe County District Judge Jerry Whitehead." "Two justices recently intervened in the Judicial Discipline Commission's attempt to hold a probable cause hearing on complaints about Whitehead." "When Rose left town briefly, sources said, Steffen and Springer promptly removed Whitehead's hearing from the docket." "'The behavior by two out of the four justices involved in this is certainly unethical and highly questionable,' said Ande Engleman, executive director of the Nevada Press Association." "She criticized the actions by Steffen and Springer. 'There are five members of the court,' she said. 'Two constitute a minority. To wait for one to leave town, so they could have a majority of two, certainly circumvents the spirit of majority rule.'" Article by A.D. Hopkins published in the R-J on October 12, 1993.

> Comment: This article demonstrates that Engleman's later attempts to explain that her complaint to the Judicial Discipline Commission (hereafter Commission) against Steffen and Springer on behalf of the Nevada Press Association was a "typographical error" was absurd, as under no accepted definition could "on behalf of the Nevada Press Association" be

a "typographical error." This article would have your readers believe the "two justices" intervened, thereby making it appear that the two subject justices were able to, and did in fact, frustrate majority rule on the court. You also failed to note that the order was signed by three justices. This was the beginning of an obvious attempt to both malign and defame these two justices and to influence the voting among the members of the court. Engleman's statement that the behavior of "two of the four justices" (meaning only Steffen and Springer despite the known fact that three justices signed the stay order) "is certainly unethical," which statement was republished by the R-J, is libelous, malicious and false, as are the statements indicating that they "waited" for Rose to leave so that they could remove Whitehead's hearing from the docket. The article also falsely conveys the unmistakable impression that two justices could remove a hearing from the court calendar and that a majority of the court could do nothing about it.

2. "A hearing into allegations against Whitehead, scheduled for September by the Nevada Commission on Judicial Discipline, has been thwarted by a secret order of the Nevada Supreme Court." "He [Steffen] wasn't talking about the issue. He was trying to make the attorney [Richard Young] look like a fool." "From the questions, you could tell he [Steffen] had information that nobody else had. It wasn't part of the record, but he'd [Steffen] say, 'Didn't you say this in chambers to Judge Whitehead?' and Young would say, 'I did not.' Well, how would Steffen have that information except by talking to Whitehead?" "Justice Cliff Young (no relation to the lawyer representing the mother) recused himself, because he was once Whitehead's law partner. Steffen, however, remained on the case and participated in

granting controversial orders delaying the discipline commission's investigation indefinitely and ordering that Whitehead be given all evidence gathered so far by the commission. Justice Charles Springer joined Steffen in issuing one ruling favorable to Whitehead, while Chief Justice Robert Rose, said to be neutral in the case, was out town." "And given I [Richard Young] just saw Springer and Steffen do in the absence of Justice Rose, one could certainly draw the inference there is a back door to justice in our state." Article by A.D. Hopkins published in the R-J October 14, 1993.

Comment: This article contains false, libelous, and malicious material, and also promotes the agenda of the R-J and its unethical secret sources in seeking to disparage, malign, and defame Justices Springer and Steffen, and convey the impression that those two justices are biased in favor of Whitehead and are thwarting the Commission's work improperly and secretly in order to protect Whitehead. The article also makes factual statements libeling Steffen regarding the Pearson case and his stated ex parte contact with Whitehead in order to obtain information about the Pearson case that "was not in the record." The investigative reporter who wrote and published the libel could have readily determined that references to the in-chambers conference were contained in the publicly-filed briefs of both parties. The mentioned conference was also discussed in the bench members circulated to all justices in preparation for oral argument. The entire effect and purpose of the libel was, it appears, to show that Steffen was unethical and that he wanted, in an improper way, to protect Whitehead. The entire article was calculated to cast Steffen and Springer in a false light and to improperly influence the court in

the Whitehead proceeding. The reference to "backdoor justice" is also false, libelous and malicious. The orchestration of this article also demonstrates malice and the intent to cast Justices Springer and Steffen in a false and bad light.

3. "In that matter [the most controversial decision made in the case], sources said, the court ordered all evidence and the identities of all witnesses turned over to Whitehead." "Sources said Guy joined Justices Thomas Steffen and Charles Springer in agreeing to give the evidence to Whitehead. Rose and Justice Miriam Shearing reportedly opposed it." "The complaint said that two Supreme Court justices violated the law and ethical standards by their secret actions against the discipline commission." Article by A.D. Hopkins published in the R-J on October 15, 1993.

Comment: The article falsely states that District Judge Dell Guy joined with Justices Steffen and Springer in ordering the Commission to give all evidence and identities of witnesses to Whitehead. The article was written in order to cast Justices Steffen and Springer in a false light and to promote the impression that these two justices were acting improperly in order to protect Judge Whitehead. This article by Hopkins was also published in the affiliated Nevada Appeal, and I hereby demand a correction of all matters identified in this letter that were published or republished in the Nevada Appeal, and hold the Nevada Appeal responsible for correcting the same.

4. "After learning of the existence of the motion Friday, Review-Journal Publisher Sherman R. Frederick said, 'This appears to be an attempt to intimidate sources of the

Review-Journal and further hide the actions of the Supreme Court.'" "Justice Thomas Steffen, who has taken the lead in the unusual case . . . ." "On July 22, Steffen signed an order halting all proceedings by the commission in the matter pending the determination of jurisdiction. However, the same order required the commission to turn over to Whitehead a list of all persons contacted in connection with the investigation, and to notify all witnesses ordered to attend a pending probable-cause hearing not to appear. The same document imposed a gag order, removed Whitehead's name from the case and required Bloom to personally maintain custody of the case file." Article by A.D. Hopkins published in the R-J on October 16, 1993.

Comment: The quoted material obviously seeks to place the court, and Steffen in particular, in a false light, implying that Steffen had foisted secret orders on the court that have wrongfully interfered with the Commission. The article deliberately omits reference to the fact that the single-judge order of July 22 was later reaffirmed by the three members of the court (Rose, Steffen and Springer) in all respects other than the discovery segment of the order, which was withdrawn subject to the further order of the court. The statement that Steffen has somehow "taken the lead" in the case is also false and intended to influence the court in its disposition of the proceeding. The R-J has repeatedly, including in this article, attempted to falsely influence its readers into believing that one or two members of the court, Steffen and/or Springer, have managed to secure control of the Whitehead proceeding with the intent to improperly and "secretly" protect Judge Whitehead.

5. "Those who can blind us, gag us and make us deaf can lead us like sheep to be shorn." "Then they thumb their noses at you." ". . . when out of the blue Justices Thomas Steffen and Charles Springer interceded. They halted proceedings, sealed every record in sight and gagged everybody who knew anything. They even stripped the name of the judge from the case file and told the discipline panel to reveal all of its witnesses to the accused judge. There is no reason for the high court to hear cases in secret, yet Steffen blithely commented in classic Orwellian newspeak, 'No such case has any public existence. You are talking about a subject that if it exists, there is no honorable way that I can indicate to you that any such case exists.'" "The actions of this court bring to mind works like travesty, Star Chamber, good ol' boy system, unconstitutional and prior restraint. In the face of all this, not a single lawyer, judge, politician or citizen has risen to declare with their names attached that this is wrong, despicable, reprehensible and utterly obscene." Nobody deemed it significant enough to speak out when a powerful and influential judge is being secretly judged by a small group of cohorts." "Are the legal professionals of this state so afraid of jeopardizing their six-figure salaries that they will sit mute in the face of judicial terrorism and chicanery?" "Any court that whitewashes in secret is as much to be feared as one that tries, convicts, sentences and executes in secret. Are we a state ruled by principles and laws or one subject to favoritism and back-room deals about which the uninitiated need not be bothered? Back-door justice is no justice at all." Editorial by Thomas Mitchell published in the R-J on October 17, 1993.

Comment: This false and malicious editorial represents a clearly unwarranted assault on the judicial branch of government. More to the point of this letter, it again seeks to convince its readers that two justices, Steffen and Springer, have managed to take over the court and prevail against two other justices and a district court judge in creating a secret

proceeding to protect a crony judge from the Commission. This editorial will one day be shown to have been "wrong, despicable, reprehensible and utterly obscene," but in the meantime I demand a full, decent, and honest correction of its contents. The Review-Journal and the Nevada Appeal have accused Justices Steffen and Springer of "chicanery," "secretly judging an influential judge," "judicial terrorism," "whitewashing in secret" and "blithely" attempting to conceal that which, despite the Nevada Constitution and rules adopted pursuant thereto, you maintain should have been public. On behalf of the two justices, I demand that you publish a complete and honorable correction of this false and irresponsible "editorial."

6. On October 19, 1993, the R-J published a "cartoon" depicting "Justice" as a woman who has lost her virtue to a "secret affair with a Nevada Supreme Court Justice."

Comment: This "cartoon" is obviously intended to apply to either Justice Steffen or Justice Springer. It is false, malicious and libelous. It is clearly designed to cast Justices Steffen and Springer in a false light.

7. "But in this case, as though that weren't secrecy enough, the Nevada Supreme Court stepped in and high-handedly wrestled the investigation away from the discipline commission, sealing its records. Whereupon the Supreme Court ordered the Judicial Discipline Commission to tell Judge Whitehead the names of everyone who had spoken to it." "The larger issue is the monstrous miscalculation the judiciary makes when it assumes the best way to maintain the public's confidence is to cover up any allegations of wrongdoing among

its number." "How long will it be before defendants are swept off the streets and subjected to secret trials -- 'disappeared' into the justice system? The people running our courts clearly would have no objection to such proceedings on principle. Maybe they're just waiting until they think they can get away with it." Editorial published in the R-J October 27, 1993.

> Comment: Taken in the context of all previous articles and editorials, it is clear that the R-J is again seeking to convince its readers that Justices Steffen and Springer have attempted to "cover up" the wrongdoing of a favored judge, and that these two justices are just waiting for the opportunity to implement their will on any or all legal matters in secret. I am truly alarmed to read such false malicious, irresponsible disinformation the R-J and its unethical secret sources have peddled to the citizens of this state. Justices Steffen and Springer are entitled to a meaningful and honest correction, and on their behalf I demand the same.

8. "On July 22 Justice Thomas Steffen signed an order halting the commission's proceedings until a hearing could be held on Whitehead's petition. He also ordered the commission to show under what authority it had sought out witnesses who had not themselves filed complaints with the commission." "The Steffen document also imposed a gag order, prohibiting members of the commission from mentioning the fact that a hearing on Whitehead's petition was pending in the Supreme Court. It ordered the clerk of the court, Janette Bloom, to maintain all relevant documents in a secret file. The Supreme Court hearing was scheduled for October 4. But when Chief Justice Robert Rose briefly left the state in September, Steffen and Justice Charles Springer canceled the hearing. Justice Miriam Shearing reportedly opposed the

cancellation." Article by A.D. Hopkins published in the R-J on October 29, 1993.

> Comment: This appears to me to be another blatant attempt to "poison the well" and create a public animus against Justices Steffen and Springer by making it appear that they are in control of the court and have either single-handedly (with Steffen) or between the two of them, wrongfully halted and frustrated the work of the Commission and imposed "secrecy" on the proceedings that cannot be justified under the law. Note that this continues to be the overriding theme adopted by the R-J from the very beginning in order to cast Steffen and Springer in a false and unfavorable light and to convey the impression that the two justices are unethical, corrupt, and willing to sacrifice the law and their responsibilities under the law to protect a crony judge. The article seeks to convince its readers that Steffen and Springer waited to find a time that Rose was gone so that they could "cancel" the Whitehead hearing. This again falsely implies that Justices Steffen and Springer have managed to stymie a majority of the court, who were somehow rendered incapable of rescheduling the hearing. Moreover, it fails to recognize that the justices of the Supreme Court routinely accord even criminal defendants charged with the most heinous crimes continuances which are sought to enable them to fully prepare to properly defend themselves.

9. "The Judicial Discipline Commission itself appears to be blocked from talking to the witnesses by an order signed by Justice Thomas Steffen. Steffen also ordered that any witnesses called for probable-cause hearing, which the

commission had already scheduled, be notified not to appear pending further notice. But his order also prohibited the commission from continuing the proceeding in any other respect, pending a hearing in the Supreme Court on Whitehead's petition challenging the commission's authority to investigate certain allegations against him. Although Steffen signed the order on July 22, a Supreme Court hearing was later vacated, and sources say it has not been rescheduled." "The state Supreme Court has ordered the commission to turn over to Whitehead the names of all potential witnesses, which he would need to present defensive evidence if a probable-cause hearing is ever held." Article by A.D. Hopkins published in the R-J on October 30, 1993.

> Comment: This another repetitive attempt to deliberately mislead the R-J's readers and to cast Steffen, individually, and Steffen and Springer as members of the court in a false light. It is also calculated to interfere with the processes of the court. Despite knowledge to the contrary, Hopkins would have his audience believe (and also the readers of other newspapers who repeat the misinformation) that Steffen's original order of July 22 was the ongoing source of staying the Commission's efforts to discipline a judge whom these two justices are accused by your paper of unethically striving to protect. Hopkins knew, but apparently deliberately disregarded, the fact that the Commission asked the full court to review and vacate the July 22 order, and that the initial order was reaffirmed in all but one aspect (which relieved the Commission of the discovery aspect of the initial order until further order of the court) by three justices, Rose, Steffen and Springer, in an order filed July 30, 1993. The July 30 order continued the stay and the requirement of confidentiality in the proceed-

ings. Hopkins and the R-J knew that as of July 30, the Commission was not "blocked" or affected in any way by the initial order of July 22 since it had been superseded by the three-judge order of July 30.

10. "'This episode is not calculated to improve it. There is a real problem of self-dealing when judges, sitting on any court, prevent a constitutional body from doing its job of overseeing judges.'" "'Particularly distasteful, Rotunda said, was the gag order, imposed by Justice Thomas Steffen, forbidding the Nevada Commission on Judicial Discipline and its lawyers from even mentioning the existence of the case. That does not promote confidence,' said Rotunda. 'It is not calculated to make people believe those things done in secret are also done properly.'" "He [Hazard] added, 'I find it difficult to believe that a court honestly interested in proper procedure could have reached such a conclusion.'" "If in fact these names are supposed to be confidential, it is pretty bad for them to use this indirect way of providing this information to the judge,' said Wolfram. 'It is highly improper.'" "She also said the Supreme Court action sidesteps Nevada's Constitution. 'There was a clear intent by whoever drafted your constitution that the discipline commission be independent of the court. And for the court to step in and interfere with that process is very disturbing. And here, the very fact they are doing it is mired in secrecy.'" Article by A.D. Hopkins published in the R-J October 31, 1993.

Comment: The R-J admits supplying the professors mentioned in this article with "certain documents" and "Review-Journal stories on it." These ethicists were spoon-fed documents and R-J stories deliberately designed to cast Justices Steffen and Springer in a false light. The ethicists were poisoned by one-sided stories that will not withstand objective scrutiny. On behalf of my clients, I demand a

complete and honest correction, including whether you or your counsel paid the ethicists to provide opinions based upon the one-sided information you gave them.

11. "Margo Piscevich, a Reno trial attorney and president-elect of the bar's board, said earlier this week, 'I think it's outrageous. It appears to me, and in my opinion, that the Judicial Discipline Commission has been bound, gagged and constitutionally raped. The process as designed is not working. Any person should be able to file a complaint against a judge without fear of reprisals and intimidation. I am not aware of any lawyer who is not disgusted.'" 'But he [James Beasley] is especially concerned with a Supreme Court order, 'which I learn from reading newspapers, was entered by the court, requiring all documentation, affidavits, statements taken in connection with that proceeding to be turned over to attorneys for Judge Whitehead." Article by A.D. Hopkins published in the R-J on November 4, 1993.

Comment: This article is strongly indicative of the extent to which the R-J has gone to libel my two clients, whom the R-J has repeatedly identified as the members of the court who are responsible for the "secret" proceedings. The publication of the false and egregious comments are intended to cast my clients in a false light even to the extent of accusing them of constitutionally "raping" the Commission. Again, the R-J has deliberately perpetuated the false claim that the court has ordered all discovery materials and names of witnesses to be delivered to Whitehead's attorneys.

12. "It would certainly be better than the current self-defeating blanket of secrecy, which can only lead to wild and inaccurate speculation on the part of a public told it is not

to know even the charges -- let alone the verdict -- of any investigation into a judge's conduct. How on earth can anyone imagine such cozy secrecy contributes to the public's trust and faith in the integrity of the judiciary?" Editorial published in the R-J on November 7, 1993.

> Comment: The wild and inaccurate "speculation" has existed only because of the false and calculated articles and editorials published by the R-J. At no time has this court indicated that any final results of its review of the petition would be "secret" and it is equally false to suggest that this court has done anything to foster the false notion that any "verdict" concerning the petitioning judge's conduct would be kept either "secret" or "cozily secret." This is another attempt to cast my clients in a false light.

13. "The time has come for Judge Whitehead, and that minority on the state Supreme Court who would apparently block this inquiry on the most slender of pretenses, to recall that all jurists accept an obligation to a cause higher than their own careers when they ascend to this position of public trust. The Nevada public teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state, no matter how egregious the allegation, so long as the judge in question shares both friendship and political ambition with at least two justices of the high court. Faith in the bedrock integrity of the court system is at risk. Unless Judge Whitehead himself sees fit to stop the fandango and allow this inquiry to proceed, the high court justices should remand this matter to a Judicial Discipline Commission which has demonstrated exemplary courage and fairness to date, and publicly commit themselves to abide by its decision." Editorial published in the R-J on November 18, 1993

Comment: This false and malicious editorial does correctly indicate the enormity of the damages inflicted upon my two clients in particular and the court system in general when it states that the public (who knows only what the R-J and its unethical secret sources have published to the citizens of this state) "teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state," and that "[f]aith in the bedrock integrity of the court system is at risk." Although time will reveal in startling fashion the extent of the R-J's malicious irresponsibility, I now demand a complete correction in this "editorial" with its accusation that a minority (my two clients) have blocked the investigation and that they have done so "on the most slender pretenses." You have also sought again to cast them in a false light by stating that they should give in to a higher cause (which is precisely what they have done) rather than seek to promote their own careers. The statement regarding friendship was made in a pejorative sense and the reference to sharing political ambition is both false and malicious. This editorial ends by asking those justices to violate the law and commit themselves publicly to abiding by the decision of the Commission, whatever that may be. This editorial not only libels my clients and seeks to place them in a false light, it represents one more attempt among many by the R-J to interfere with the judicial processes of the court and the voting among its members on a pending matter.

14. "Whitehead case a struggle for the soul of Nevada's jurisprudence system." "The Nevada Supreme Court is locked in a legal struggle between the proponents of fair and

equitable treatment for all under the law, and those who would subvert and pervert the law for their cronies and political allies." Justices Thomas Steffen and Charles Springer have joined forces to wrest the probe away from the discipline panel by embracing a series of rather flimsy and legally questionable rationales." "Where will Judge Guy stand? Will he stand on the side of law? Or will he stand with those who are tempted by power and political ambition? We dare say he will stand with what he believes to be right." "They have sought to remove from the case two sitting justices who opposed them, while ignoring the pending case before the discipline commission concerning the two justices already in their pocket." "And can any of us expect justice from a system so easily corrupted?" Editorial published in the R-J on November 21, 1993.

Comment: This blatant attempt to manipulate the judicial process by creating the appearance that my clients are bedeviling the Commission and the court by "wresting the probe away from the discipline panel" through flimsy legal rationales is both false and oozing with malice. The R-J has once again sought to deceive its readers into believing that these two justices have managed to grasp the insidious role of dictators on the court against the wishes of a majority. Dishonestly, the R-J conceals the fact that the orders staying the Commission until the petition challenging jurisdiction is decided have, since July 30, 1993, been signed by either three justices or two justices and District Judge Dell Guy. The order signed by Judge Guy, previously described by the R-J as the most controversial, requires the Commission to produce investigative materials to the court for an in camera inspection. The statement charging my clients with subverting and perverting the law for their crony is false and

malicious. The entire editorial, filled with false and libelous statements, patently seeks to cast my clients in a false light and to interfere with and influence the court in its disposition of a pending case.

15. "And an equally large story, irrespective of Whitehead's guilt or innocence, is why the Supreme Court, notably Justices Tom Steffen and Charles Springer, is going to such lengths to quash the commission's probe -- actions that have resulted in near-universal opprobrium, understandably in private, from the legal community." "This from the same newspaper with the longstanding, cozy relationship with one E.M. Gunderson, the former chief justice who is an ally of Whitehead and still wields great influence on the court." But, consider this: The paper (R-J) is the only media outlet exploring this clash between the Supreme Court and the commission, the only body in the state with any authority to regulate the high court. By the time the facts become clear -- assuming they ever do -- a public that realizes justice may have taken a vacation from that Taj Mahal in the Capitol courtyard will feel ill." Commentary by Jon Ralston published in the R-J on November 23, 1993.

Comment: This article falsely attributes to Justices Steffen and Springer the "blame" and the power to "quash" the Commission's probe, a proposition which the R-J and its support group must know is false. Mr. Ralston does, however, favor us with his assessment of the "near universal opprobrium" within the legal community which the R-J has single-handedly caused with its false and malicious articles. Notably, the R-J again lauds itself for having collaborated with its secret sources in exposing what it would have its readers believe is the product of two unethical justices trying to protect a crony judge. When the truth

finally surfaces, one must wonder if the R-J will have sufficient integrity to print it. It is also noteworthy that the R-J again attempts to deceive its readers concerning the governmental structure of our state. Nowhere is the Commission given power to "regulate" the Supreme Court or any other court. On behalf of my clients, I demand a full correction of the false and malicious statements contained in this commentary.

16. "A July 22 order from Supreme Court Justice Thomas Steffen halted the discipline procedures pending a Supreme Court hearing on the issues Whitehead raised, but four months later, no hearing has been held, and none is scheduled." Article by A.D. Hopkins published in the R-J on November 25, 1993.

Comment: This is yet another attempt to deceive the R-J's readers, and other news sources, into believing that Justice Steffen's perfectly proper order of July 22, 1993, has somehow managed to be the obstacle to the Whitehead matter being returned to the Commission. The R-J has deliberately sought to defame and malign Justices Steffen and Springer in order to accomplish its improper objectives and to influence the court's disposition of the matter that has been thoroughly poisoned by the irresponsible "reporting" of this newspaper. The R-J has long had actual knowledge that a three-judge order has been the source of staying the Commission's proceedings since July 30, 1993. I demand that you forthrightly reveal your motive in your ongoing efforts to decive Nevadans with your deliberate distortion of these proceedings.

17. "Two Nevada Supreme Court justices may have violated five ethical canons and four state laws in handling a disciplinary case involving a Washoe County judge. The possible violations are raised in a complaint filed with the State Judicial Discipline Commission in mid-October." "Several legal scholars said that with the filing of the complaint against Steffen and Springer, they should be removed from hearing district Judge Jerry Whitehead's case, because all three jurists are now the subject of Judicial Discipline Commission review." "On July 22, Steffen stayed the commission proceedings pending a Supreme Court hearing on Whitehead's petition. But on Sept. 20, when Whitehead's lawyers complained that the discipline commission was not providing needed documents, Steffen and Springer canceled the court's hearing while leaving the stay order in effect." "Engleman's complaint accuses the justices of breaking the state's open meeting law by entering a secret order and filing a secret case within the Supreme Court. The complaint adds that the justices also may have violated laws against making an agreement to act in an unlawful manner; violated laws against interference with the cause of justice; and violated provisions of the Nevada Constitution, which says the commission had to either dismiss complaints against Whitehead or proceed to the probable cause hearing that the Supreme Court action has so far blocked. The justice's actions also violate five canons of the Nevada Code of Judicial Conduct, the complaint says. It says the two justices' relationship with Whitehead presents at least an appearance of impropriety in violation of Canon 2. That canon also says political relationships must not influence a judge's conduct. The complaint says the justices violated other canons by interfering with the normal course of justice, by failing to uphold standards of integrity, by acting in a manner that casts doubt on a judge's impartiality, and by participating in inappropriate political activities." "Charles Wolfram, a professor at Cornell Law School and author of 'Modern Legal Ethics,' said Engleman's complaint should prompt Springer and Steffen to recuse themselves from the Whitehead case. 'Some of those charges are that they

intervened out of political favoritism. If so, that cannot be appropriate,' Wolfram said." Article by A.D. Hopkins published in the R-J December 1, 1993.

Comment: This article is false and malicious in that the R-J, whose attorney "assisted" Engleman in the preparation of the complaint, has to know that the allegations of the complaint are absurd, false and malicious. Anyone can file a complaint and charge any judge with misconduct. In this case, either Engleman received incredibly bad advice and information, or the complaint was yet another effort by the R-J and its collaborators to falsely smear the reputations of my two clients and manipulate the pending proceedings before the court concerning the Whitehead matter. There is no truth to the allegations of the complaint and no means of ever proving that which does not exist. Judicial proceedings are expressly exempted from the open meeting law by the law itself, and the two justices have been faithful to a fault in obeying the law and the Canons of Judicial Conduct in these proceedings. It doesn't take much imagination to know who and why this attempt to smear these two justices was so maliciously orchestrated. On behalf of my clients, I demand a complete and total correction of this blatant attempt to defame and cast my clients in a false light and to manipulate the panel that will ultimately decide the Whitehead petition.

18. ". . . the eerie inner workings of the Judicial Discipline Commission and the Nevada Supreme Court. If recent articles on the subject aren't astounding you with the complex rhetoric of ethical issues, then they are churning your stomach with the image of an incestuously cozy judicial

system." The article goes on to imply that former Justice E.M. Gunderson is exercising undue influence on members of the court. Article by John L. Smith published in the R-J on December 2, 1993.

> Comment: The false innuendo in this article is clearly intended to imply that my clients are engaged in "incestuously cozy" judicial maneuvering and that they are being influenced by former Justice Gunderson in their handling of the Whitehead proceedings. The articles seeks to cast my clients in a false light as there is no truth to the innuendo or the inferences unmistakenly portrayed in the article. It is again noted that the "churning feeling" in your readers stomachs have been placed there by the carefully planned and malicious attack on the reputations of my clients. I demand a complete and total correction.

19. The "cartoon" depicting "judicial ethics" taking a bath and a dark figure (represented to be the Nevada Supreme Court) with a huge knife ready to be plunged in the back of "judicial ethics" obviously is a takeoff on the movie "Psycho." This piece of work appeared in the R-J on December 5, 1993.

> Comment: This "work" receives an "A" grade for imagination and an "F" for portraying a false and malicious caricature of the court in general and, based on the repetitious libel appearing in the R-J against my clients, Justices Steffen and Springer in particular. This is perhaps a perfect portrait of the malice with which the R-J has repeatedly defamed and smeared these two justices. I demand a complete and total correction.

20. "Justice Thomas Steffen in July stayed proceedings pending Supreme Court hearing on the issues Whitehead raised . . . . " Article by A.D. Hopkins published in the R-J on December 9, 1993.

Comment: This is another deliberate attempt to mislead R-J readers into believing that Justice Steffen has effectively, and single-handedly, stayed the judicial proceedings involving the Commission and Judge Whitehead. Mr. Hopkins had known for months that three judges stayed the Commission proceedings pursuant to law on July 30, 1993. This attempt at casting Justice Steffen in a false light, contrary to actual knowledge in the possession of the writer, must be corrected.

21. "The corruption of the state judicial discipline process in the Whitehead case started out with an Orwellian flavor. (The law says what we say it says because we wrote it and can interpret it as we see fit.) It soured to Kafkaesque. (You can use the same argument today as you have in the past but reach a totally different conclusion.) Now it has disappeared entirely down Lewis Carroll's rabbit hole." "In fact, the case was following the 'due process' course through the Judicial Discipline Commission until Whitehead's cronies on the Supreme Court derailed it." Editorial published in the R-J on December 15, 1993.

Comment: This is still another attempt to maliciously defame my clients and cast them in a false light. Of course, in keeping with numerous other false and libelous articles and editorials in the R-J, the R-J would have its readers believe that Justices Steffen and Springer are "Whitehead's cronies" and that the two of them have somehow managed to circumvent majority rule on the court and

thwart the proceedings of the Commission against Whitehead. This editorial is false and malicious and I demand that it be fully and fairly corrected.

Perhaps never before in the history of this state has there been such a dedicated conspiracy between a newspaper and unethical secret "sources" engaged to achieve the destruction of specific members of the judiciary and to persuade Nevada citizens that justice has been sold for "cronyism" and corrupt political gain. The damage to the court as an institution is incalculable and irreparable, as is the interference in a pending case. From a taxpayer's standpoint, you and your secret collaborators have cost the citizens of this state an enormous loss in the form of wasted effort, time, resources, and human energy in attempting to deal with the irresponsible, false, and unrelenting disinformation you have caused to be spread like a cancer throughout this state.

You have falsely, recklessly, wrongfully, and maliciously defamed and libeled my clients repeatedly on the pages of your newspaper, and have caused other newspapers to publish the irresponsible and false libel appearing in your paper. You have forced them to divert their efforts from "genuine" issues, to the problems you have created both for my clients and the court as a whole. You have inflicted untold damage upon the reputations of Justices Steffen and Springer, and have created great anguish to my clients and their families without <u>any just cause whatsoever</u>. You have also siphoned much of their energy to the task of determining how to deal with such a malign, irresponsible combination. In short, you have truly indicated part of the enormity of the damages inflicted upon my clients by you when you said that the "Nevada public teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state" and that Justice Steffen's and Justice Springer's actions "have resulted in near-universal opprobrium for the legal community." I remind you by way of emphasis that <u>all</u> of the

damage and injury suffered by my clients is traceable exclusively to you and that a "campaign" of correction no less conspicuous and ongoing than your "campaign" to defame, sully, and destroy, will not even begin to counterbalance the extent of the damage and injury you have inflicted upon them.

Fortunately for these two justices and the cause of justice in this state, you severely miscalculated the level of intelligence and integrity within the Board of Bar Governors. You have been condemning my clients mercilessly for their "interference" based upon "flimsy" reasoning, the "most slender of pretenses" and the violation of law and ethics. I have not read where the R-J concluded that the Board of Bar Governors, who quite properly determined that the court's intervention and confidentiality (the two aspects of these proceedings that you have most harshly condemned and attributed to my clients) were proper, did so because of corruption or lack of competence or some vague intimidation by a former Supreme Court Justice. Imagine how the ethicists you and your cronies baited into voicing public opinions concerning the propriety of my clients' actions will feel when they realize that they were spoon-fed spoiled and tainted morsels upon which to base their conclusions.

You have boasted that you were able to secure and publish information about "secret" proceedings unlawfully adopted by these two justices. You have wrongfully and maliciously castigated my clients for doing what is required of them by the Nevada Constitution and the Commission's rules. You have sought to manipulate and influence the disposition of the matter inside the court and you have irresponsibily and vastly complicated the nature of the proceeding before the court and greatly delayed the time of its resolution. You and your valued "secret sources" must bear the full responsibility for your course of conduct. Although my clients and I demand a full and honest correction of the malicious, scandalous, false, and libelous statements

published in the R-J, we will not hold our breath anticipating fairness or decency from you or your group.

Perhaps the most ludicrous and hollow of your reporting or editorializing occurred in an editorial written by Thomas Mitchell and appearing in the R-J on October 31, 1993, when he said: "[W]e are fully aware that our stock-in-trade consists of accurate and fair news reporting, exhaustive information . . . and untainted commentary." My clients fervently hope that before this entire quagmire, which you and your sources alone have created, is purged of its toxins, some responsible national media group will condemn the R-J for the terrible disservice it has provided to the government, citizens, and certain judges of this state by reason of its frenzied and irresponsible "reporting" in this entire matter. Indeed, the "frenzy" reached a bizarre crescendo when the R-J turned on other newspapers for refusing to join in its strident demands for a lynching. Thankfully, the R-J also miscalculated the depth of integrity and intestinal fortitude within the Nevada Press Association, which has taken a responsible "wait and see" approach to the entire matter.

I trust that someone in your organization may realize the enormous damage you have caused to my clients with no just cause either in fact or in law. If so, I trust that reason will prevail and you will take full measures to prominently correct all of the numerous false statements, insults, and false innuendo you have so deliberately planned and published concerning them. In any event, pursuant to NRS 41.336, I demand on behalf of my clients that you do so.

Resolutely,

/s/ JAMES E. WILSON, JR.
Attorney at Law

**EXHIBIT F**

**WHERE I STAND**
**Las Vegas Sun**
**Sunday, August 13, 1995**

## WHEN MEDIA AND JUSTICE COLLIDE

**THOMAS STEFFEN** IS CHIEF JUSTICE OF THE NEVADA SUPREME COURT. IN TODAY'S GUEST COLUMN, HE EXPLAINS WHY HE IS ANGRY ABOUT THE MANY INACCURACIES REPORTED ABOUT THE COURT BY THE LAS VEGAS REVIEW-JOURNAL.

**PREFATORILY, I WANT** to emphasize that the Las Vegas SUN has not contributed to the underlying reasons for my topic of discussion.

Perhaps the press has no greater obligation, and could perform no greater service, than to expose judicial corruption when it has been responsibly determined to exist. Our citizens have every right to demand honor and rectitude from their judges, and to harshly punish betrayals of the public trust by judicial officers.

On the other hand, equal condemnation should arise in the face of an irresponsible and purposeful attempt on the part of any newspaper to characterize as evil that which is good, and to publish as true that which is untrue.

Over the past two years, there has been irresponsible and inaccurate reporting and editorializing on what has become a high-profile judicial discipline case.

I began with two premises, both true. First, *the case* was processed by the Nevada Supreme Court with 100 percent honor and rectitude. Second, the press has a serious duty not to betray the public trust implicit in the First Amendment guarantee of freedom of the press.

I have pondered possible remedies for a betrayal of the public trust by the media. An unethical judge may be removed or otherwise disciplined. But what do you do with an unethical newspaper? There are published ethical codes applicable to the press, but virtually no enforcement mechanisms.

The current Code of Ethics of the Society of Professional Journalists embraces many noteworthy canons. Here are a combination of just a few of at least 17 canons that were demonstrably violated by one media outlet alone:

- "We believe in public enlightenment as the forerunner of justice, and in our constitutional role to seek the truth as part of the public's right to know the truth."

- Journalists are required to perform objectively, accurately and fairly with no excuse for inaccuracies or superficiality.

- Journalists violate a "high trust," by using their professional positions for "unworthy motives," and "news reports should be free of opinion or bias and represent all sides of an issue."

I would be pleased to demonstrate before an impartial board of inquiry that in reporting and editorializing on *the case*, a single newspaper has flagrantly violated each of the referenced canons of ethics. Despite its unilateral reliance on unethical sources of information, that publication should have recognized early on that the Nevada Supreme Court was dealing with a Discipline Commission that, however well-motivated, had been secretly administering discipline in violation of the Nevada Constitution.

Because our court had never had the opportunity to interpret the commission's rules since they became effective in 1988, *the case* presented the first opportunity for doing so.

The media source was actually attacking the court for acting in secrecy even as the court was moving to eliminate unlawful secrecy from judicial discipline proceedings. Fortunately, the Nevada Board of Bar Governors agreed that the court acted appropriately.

The court has done nothing more or less than it was ethically and legally obligated to do regarding *the case*. It did not prevent the disciplinary action; it merely interpreted the commission rules and ordered the panel to comply with its rules and the Nevada Constitution.

Though the court has handled *the case* with absolute fidelity to its public trust, the court and two of its justices were portrayed as attempting to cover up judicial wrongdoing, acting unethically in favor of judicial secrecy, and trying to protect a judicial crony at the expense of a viable Discipline Commission. The media source decried the fact that no other lawyers, judges or citizens raised their names in public protest of the "wrong, despicable, reprehensible and utterly obscene" actions of the court. Thereafter, proud of its public revelatory campaign, the press member attacked its own media colleagues for not having joined in the feeding frenzy.

And for all of its efforts to demean and trash the court, and despite its ostensible abhorrence for secrecy in government, the media source failed to recognize or view as important the fact that the Discipline Commission had unlawfully disciplined judges in secret for many years!

The damage wrought by a failure of media ethics has been enormous. Aside from the impairment of reputation suffered by certain judges, there has been significant loss of public confidence in the court system, **all for no just reason!** Victims include our citizens, the First Amendment, Nevada's third branch of government and good government in general.

I strongly hope that accountability may be forthcoming from within the journalism profession. The First Amendment guarantee of freedom of the press could not survive as we know it if, rather than disseminating truth, mass media are given free rein to become an anathema to an enlightened society.

**EXHIBIT G**

**Justices' order misled Supreme Court**
**Las Vegas Review-Journal**
**Sunday, September 24, 1995**

□TWO LAWYERS SAY REASONS GIVEN FOR DISMISSING ETHICS COMPLAINTS AGAINST A JUDGE CREATED A FALSE IMPRESSION.

**By A.D. Hopkins**
**Review-Journal**

Misleading statements and one falsehood were presented as facts to the Nevada Supreme Court when two justices sought in 1993 to dismiss ethics complaints against a Washoe County judge.

Two lawyers pointed out two misrepresentations in the order, which sources say Justice Charles Springer claimed to have authored. Those sources also say Justice Thomas Steffen urged fellow justices to sign the order, though Steffen denies that. The 1993 proposed order failed, but a court panel eventually dismissed the original charges against District Judge Jerry Carr Whitehead.

Donald Nomura, a Reno attorney who was a potential witness to one of the ethical offenses attributed to Whitehead, said Thursday he never gave an affidavit attributed to him in the proposed order. "It doesn't exist," he said.

In addition, Donald Campbell, a Las Vegas attorney who investigated the complaints against Whitehead for the Judicial Discipline Commission, said the order's author created the impression that key evidence didn't exist, even though the justices already had it in hand.

Nomura said, "It is a lie there was an affidavit. It's a lie that the behavior it supposedly cited ever occurred. And it is a lie that I ever suggested it occurred. In fact I said the opposite.

"If they are making reference to this affidavit, it is proof positive that there was contact between representatives of Whitehead and the court," said Nomura. The Nevada Code of Judicial Conduct says judges must not engage in substantive communications about a pending case with one side in a case without the knowledge of the other.

Nomura has not spoken publicly about the case until now, "I am not excited about being involved in this, but I am less excited about having my name used in that way," he said.

The proposed order, presented to the court on or before Oct. 4, 1993, contained a footnote accusing Campbell of inappropriate behavior when interviewing witnesses: "In doing this he has (we are told) engaged in 'completely inappropriate behavior' in the form of 'brow-beating witnesses' and insisting that they not communicate the contents of his interview to others (see, e.g., Affidavit of Donald Namura)," misspelling Nomura's name.

Nomura says there is no affidavit, and a Supreme Court employee was unable to find one this past week by examining the files of Whitehead's suit against the Judicial Discipline Commission.

There was in fact an affidavit before the court, from Whitehead's lawyers, saying they had sought an affidavit from Nomura but didn't get it.

"They wanted me to say the interviewing process was coercive and intimidating. But it was not, so I wouldn't agree to say so," Nomura said this week.

Campbell also pointed out misleading statements in the proposed order, including a statement that "the judge was neither advised of the names of his accusers nor provided with 'facts which, if true, would establish grounds for discipline.'"

But a document filed with the court on Aug. 17 and provided to Whitehead's lawyers contained that information, Campbell said.

"I was shocked once I read this," Campbell said. "The false impression is created, throughout this order, that no complaints were filed with the commission, and the commission just told me to go out and dig up dirt on Judge Whitehead. That is absolutely untrue. There were numerous complaints under oath, including several from Judge (Peter) Breen and several from Dorothy Nash Holmes, and Judge Brent Adams also sent in a written complaint to the commission. The only thing I ever investigated was those complaints. I didn't pick those out of thin air . . . .

"At the time this order was proposed, the court had those complaints in hand." The order implied the complainants were unknown to the court.

Other figures connected to the case were astonished and disappointed that the court tried to dismiss the Whitehead matter secretly, without allowing the discipline commission to hold hearings on whether Whitehead actually committed the offenses.

Breen, Whitehead's fellow judge in the Washoe County District Court and one of those who filed a complaint about Whitehead's conduct, said, "The fact that was proposed does not surprise me, but part of me didn't want it to be there. It is so disturbing in view of everything else the court has said. They said that no decision had been made on the merits of the case, that they didn't want to make one, and now it looks like they did."

Breen said he also could see no legitimate reason for an order that would have dismissed accusations against Whitehead yet demanded the commission turn over to the court every document or shred of evidence relating to Whitehead.

"I've been around the judiciary all my life and I haven't heard of such a thing. There is no parallel in the criminal process. The most we can do is seal the record of arrests and convictions and in some cases a court case. But they could have done that without demanding everything be turned over to the court. I see no legitimate reason for it."

Dorothy Nash Holmes, who filed complaints against Whitehead when she was Washoe County's district attorney, reacted similarly. "It's incredible to me that so many people were accused by the court of trying to prevent due process to the judge, and it turns out somebody on the court was trying to deny it to us. All we ever wanted was to get our charges heard, and it looks like they were determined we wouldn't."

Whitehead was accused of attempting to orchestrate a change of venue favorable to a defendant being prosecuted by Holmes. The specific ethical violation involved in that process and most of the other charges against Whitehead was improper communications with parties having business before the court.

Margo Piscevich, a former state bar president who was chastised in one Supreme Court opinion for commenting on the Whitehead case, said, "In hindsight I find it amusing that Justices Steffen and Springer believed the allegations against Whitehead had no merit, when he resigned in lieu of being prosecuted.

"Whitehead agreed to resign in return for an agreement from federal authorities, who conducted a separate investigation, that he would not be prosecuted. It was never revealed whether the federal investigation involved the same matters as the discipline commission's."

Steffen has not responded to the Review-Journal's requests for an interview about the 1993 document. The Las Vegas Sun reported Friday that Steffen acknowledged the document is authentic, but denied trying to get other justices

to sign it. "I am certain I would not have signed it. I doubt Justice Springer would have signed it whether he wrote it or not," Steffen was quoted as saying.

**EXHIBIT H**

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 24598

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IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

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ORDER DISMISSING COMPLAINT

By petition filed with this court on July 22, 1993, the petitioner, the Honorable Jerry Carr Whitehead, district court judge of the Second Judicial District Court in and for the County of Washoe, sought relief from proceedings instigated against him in the Nevada Commission on Judicial Discipline (Commission). In addition to seeking a stay of further proceedings by the Commission, and the discovery of documents and activities involved in the Commission's decisions and investigative efforts, Petitioner sought justification of the Commission's jurisdiction in the premises.

Determining that Petitioner had set forth issues of arguable merit, this court, by order of a single justice entered July 22, 1993, issued the requested stay, ordered an answer and full discovery as requested in the petition. On July 30, 1993, a majority of the members of this court reaffirmed the order issued on July 22, 1993, except that the discovery granted in the earlier order was suspended until further order of the court.

Almost from the outset, the Commission, through a "Special Deputy Attorney General and Special Counsel," Donald J. Campbell, has taken the position of a partial advocate who has unhesitatingly referred to petitioner in disparaging terms as if he had been tried and found guilty. The "special counsel" has wandered far and wide in contacting individuals who may provide information that could be used against Petitioner in furtherance of what has obviously been a concerted, focused effort to assure the eventual embarrassment, discipline or removal of Petitioner.

Apparently oblivious to a change from the interim rules of procedure applicable in the case of Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 830 P.2d 107 (1992) to the current Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline (ARJD), Mr. Campbell declared that the Commission has "precisely" followed the Goldman procedure in the case against Petitioner. This, of course, is an admission that the Commission, through Mr. Campbell, has failed to recognize the substantive differences in procedure existing in Goldman and the instant matter.

Mr. Campbell has also sought to justify the methodology of the instant case by referring to certain statutes deemed by him to be supportive of his investigative efforts and the procedure adopted by the Commission. At this point it is sufficient for our purposes to note that the Nevada Constitution directed and empowered this court, not the legislature, to adopt rules of procedure for the governance of the Commission. See Art. 6, § 21 (5). Under constitutional mandate, this court's powers were extended to include providing the grounds for censuring of a justice or judge and rules relating to the conduct of investigations and hearings by the Commission. It is disingenuous for special counsel to attempt to justify his actions by citing unauthoritative sources for his authority. Stating the obvious, in the event of conflict between the ARJD

adopted pursuant to constitutional authority by this court, and any statute, the latter must give way to the former.

By way of further preliminary observation, the instant case represents perhaps the most egregious of several recent examples of the Commission exercising its powers without regard for the rules of procedure by which it is bound and which represent the only real assurance of due process to a judicial officer who is the subject of a complaint. Over the last several months, the Commission has, without jurisdiction, ordered or required at least four district court judges to submit to various forms of discipline, the propriety of which will not be discussed here. The point to be noted is that in each case, the form of discipline was bargained for or exacted without a finding of probable cause, the sine qua non of the Commission's jurisdiction to impose any form of discipline on a respondent judge. See Nev. Const. Art. 6, § 21 (7) (after preliminary investigation, Commission shall either dismiss the matter or order hearing before it); ARJD Rules 15, 16. We note by way of observation at this point, that ARJD Rule 31 addressing consent orders, is contained in Section V of the rules entitled "PROCEDURE AFTER FINDING OF PROBABLE CAUSE."

In analyzing the procedures adopted by the Commission in the instant case, it may be readily seen that the Commission has indulged in serious, substantive violations of the ARJD which have paved the way for the systematic and notorious persecution and disparagement of the Petitioner. Of course, whether Petitioner eventually attempts to ascertain and deal with the forces, causes and motives behind the extreme measures taken against him is not the concern of this court. The fact that they have been allowed to occur under the auspices of the Commission is, however, of grave concern to this court.

The following analysis of the activities characterizing the effort to engage and bring to bear the full weight of the

disciplinary powers of the Commission against the Petitioner describes the magnitude of our concerns for the maintaining of an independent judiciary. Each reference to a "Rule" refers to a rule of the ADMINISTRATIVE AND PROCEDURAL RULES FOR THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE adopted by this court effective as of April 29, 1988.

1. Rule 12 requires a complaint against a judge to be in writing, under oath, and signed by the complainant except "in exceptional circumstances, in which the commission has substantial reason to believe that a complainant may in likelihood suffer untoward risk of embarrassment, harassment, or other detrimental consequences," in which case "the commission may on request, authorize its executive officer to sign and swear to a complaint on information and belief, in the complainant's stead."

RULE VIOLATION: First, the complaint, styled "COMPLAINT SEEKING DETERMINATION OF PROBABLE CAUSE" was not issued under exceptional circumstances at the request of any true complainant in order to prevent embarrassment, harassment or other detrimental consequences to the actual complainant. Moreover, there is not the slightest indication in this record that there was any possibility, let alone "likelihood" of embarrassment, harassment, or other detrimental consequences that would be suffered by any complainant. Nor does the record reflect any request for anonymity by any complaining party. Second, the complaint was prepared under the auspices of the Commission to incorporate the investigative efforts of its own appointed "prosecutor," as indeed revealed by the caption of the complaint seeking a determination of probable cause as opposed to a probable cause hearing. Third, rather than simply reflecting a sworn complaint from a complainant outside the Commission (a necessary prerequisite to Commission jurisdiction except under the limited circumstances set forth in Rule 10), Rule 13 ("A complaint submitted to the commis-

sion . . ."), Rule 14 ("The commission will consider all complaints brought before it . . . "), the complaint is the work product of the Commission's own agent who systematically canvassed numerous persons in order to develop what he considered an adequate factual basis for preparing and signing an "in-house" complaint. Moreover, the so-called complaint evidences the most serious impropriety of having an arm of the Commission, obligated to absolute impartiality and fairness, acting as investigator, prosecutor, and judge prior to a finding of probable cause, as reflected by the strongly emotive, disparaging and conclusory language of the complaint and the Commission filings in this court. This procedure is not authorized by any rule, and is contrary to both the letter and spirit of the rules.

We might be willing to overlook a failure to follow Rule 12, except for the prejudicial effect inherent in Ms. King's violation of the rule. The record contains no indication that the Commission did, as required by the rule, "permit" Ms. King to proceed to file a complaint in the "complainant's stead," even if there had been, in fact, grounds for permitting such a surrogate filing. The prejudice in this case stems in part from the fact that the judge was neither advised of the names of his accusers nor provided with "facts which, is true, would establish grounds for discipline." ARJD Rule 12.

The "Complaint Seeking Determination of Probable Cause" is defective in that there has been no request that Eve King file the complaint, rather than the "real" complainant, whoever that might be, there has been no showing of "embarrassment" or other cause for permitting Eve King, rather than the real complainant, to complain "upon oath in writing," and, most critically, the record contains no indication that the Commission did in fact "permit the executive officer to complain in the complainant's stead." The proceedings must be dismissed on these grounds alone; however, there are other reasons warranting a dismissal.

Understandably (because Ms. King claims no actual knowledge of judicial misconduct on the part of Judge Whitehead), the Complaint Seeking Determination of Probable Cause is almost completely deficient of "facts which, if true, would establish grounds for discipline." ARJD Rule 12. Although the Nevada Constitution requires a showing of "willful misconduct, willful or persistent failure to perform the duties of his office or official intemperance," there is no specification of which category Ms. King has intended to pursue against Judge Whitehead. Ms. King bases all "charges" upon Canon 2A of the Code of Judicial Conduct which merely enjoins our judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We find no facts in the multiple "Counts" levied by Ms. King against the judge that show that Judge Whitehead did not respect or comply with the law or that he failed to promote public confidence in the integrity and impartiality of the judiciary. Further, even if the judge's "respect" for the law or his supposed failure to promote public confidence in the integrity and impartiality of the judiciary were put at issue, they would hardly support disciplinary action based on any of the stated constitutional grounds, willful misconduct, willful or persistent failure to perform, or habitual intemperance. The constitutional predicates for judicial discipline are never mentioned in the Complaint now before the court. ARJD Rule 11 restricts the charges in this matter to "acts and omissions . . . which contravene express provisions of the Nevada Code of Judicial Conduct." Ms. King's necessarily indirect and hearsay complaint relates no specific acts on the part of Judge Whitehead which contravene any express provisions of the Code.

If Ms. King had been authoritatively permitted to file the subject complaint, it would have been necessary for her to relate specific acts that had been charged by an identified (if anonymous) complainant and to specify the "express provisions" of the Code that she claimed were being "contra-

vened" by Judge Whitehead. Obviously, Ms. King knows nothing about Judge Whitehead's conduct and is herself a victim of the phantom investigation resulting in this complaint. What she has filed, even had she complied with ARJD Rule 12, does not come remotely close to stating a cognizable judicial discipline complaint. Ms. King's Complaint must be dismissed on the ground that the complaint is jurisdictionally insufficient and fails to state any grounds upon which disciplinary action can proceed before the Commission. There are still other reasons why the complaint must be dismissed.

2. Article 6, § 21 (7) of the Nevada Constitution provides, in pertinent part, that "[t]he Commission shall, after preliminary investigation, dismiss the matter or order a hearing to be held before it." (Emphasis added.) Mr. Campbell has fixed on the highlighted terms as license for a wholesale investigation untethered to an incoming sworn complaint as contemplated by Rule 12. Moreover, he has repeatedly stressed that he has strongly admonished all of his investigative contacts of the confidential nature of his inquiries. It is clear that his admonitions have been of little comfort to the beleaguered Petitioner whose alleged misbehavior has been discussed far and wide by Mr. Campbell albeit within what he has described as confidential settings. A judge's reputation can just as easily be besmirched by Mr. Campbell's "confidential" methodology as it could be if printed in a newspaper circulated only to the same interviewees. Nevertheless, as we shall see, it is not the extent to which petitioner's reputation has been damaged that is of immediate issue here. Rather, the issue involves the propriety of Mr. Campbell's investigative activities as authorized by the Commission.

RULE VIOLATION: The Rules lend context and meaning to "preliminary investigation." Rule 14 provides, in part, that "[t]he commission will consider all complaints brought before it with a view to determining whether or not there exists sufficient cause to proceed to a probable cause hearing." The rule does not expressly or impliedly authorize

the Commission to use an incoming complaint as a basis from which to launch a full scale investigation into any and all aspects of a judge's judicial performance. The incoming complaint sets forth the length and breadth of any "preliminary investigation" for determining whether there is a basis for scheduling a probable cause hearing. Understandably, the Rules provide for the appointment by the Commission of a prosecuting attorney only after there has been a determination of probable cause. See Rule 16. Here, special counsel Campbell is in every reasonable sense a "prosecuting attorney" who has extensively investigated prospects for complaint far beyond those contained in letters of "complaint" sent to the Commission. Moreover, Campbell has, despite the denomination of the complaint, prepared and signed a charging document strongly akin to the formal statement of charges required to be prepared by the prosecuting attorney after a finding of probable cause. Rule 16.

It is clear to this court that Rule 14 contemplates a prescreening of complaints for purposes of determining whether Rule 11 grounds have been alleged and if so, whether there is a factual basis for the complaint. A preliminary investigation regarding any factual support for the complaint would entail a simplified and inexpensive procedure. A telephone communication with the complainant would ordinarily reveal the extent of the evidence supporting the written charges. For example, the complainant may indicate that Attorney Jones advised him that the alleged misconduct occurred in his presence. A call to Attorney Jones would then afford confirmation or denial of the alleged misconduct. If Attorney Jones' explanation appears forthright, and if true, would constitute a Rule 11 grounds for discipline, the Commission would then have a basis for scheduling a probable cause hearing and promptly providing written notice to the respondent judge of the complaint and the necessity of filing a written response thereto within 30 days after service. Rule 14.

We are informed by a member of the Commission that large numbers of "complaints" are submitted to the Commission against judicial officers in Nevada. This is hardly surprising in that judges by the very nature of their office are constantly making decisions that are a source of agitation and disappointment to countless numbers of litigants and attorneys. We are also informed, not surprisingly, that the vast majority of complaints are without merit. We have also been advised by a member of the Commission, as grounds for having imposed discipline on certain judges without benefit of the jurisdictional prerequisite of a finding of probable cause, that it is too expensive and time consuming to conduct hearings, and that if the Commission were obligated to do so he and other members of the Commission would be forced to resign. Aside from the obvious invalidity of discipline imposed without jurisdiction in the name of expediency, we have grave concerns over the selective nature of the instant "prosecution," with its enormous commitment of time, resources, and expense, when compared with other matters of a patently more serious nature that have come before the Commission over a period of the last several months that have demonstrably resulted in far less concern by the Commission than the instant matter.

In any event, it is clear to this court that the "preliminary investigation" referred to in the Nevada Constitution relates to a specific complaint and charge by a specific complainant, and that it was obviously intended, by its own terms, to apply to the minimum effort necessary to determine whether to dismiss the complaint on its face or proceed to a probable cause hearing. In our recent opinion in In re Stuhff, 108 Nev. 629, 837 P.2d 853 (1992) we severely disciplined an attorney who served a district court judge with a copy of a complaint to the Nevada Commission on Judicial Discipline. There we held as follows:

> Rules 12 and 14 . . . clearly provide that a grievance against a judge is initiated by filing an initial

> complaint. Nothing in either rule requires notice; in fact, they implicitly forbid it. Additionally, Rule 5 of this subsection provides that "[a]11 proceedings must be confidential until there has been a determination of probable cause and filing of formal statements of charges."

Id., 108 Nev. at ____, 837 P.2d at 857.

In Stuhff, the attorney alleged in his complaint to the Commission that the respondent judge had committed misconduct in presiding over a specific criminal trial. Moreover, in his testimony before the Southern Nevada Disciplinary Board, attorney Stuhff testified that he "didn't think he [the respondent judge] should have tried [his criminal client] or anyone else and from what I've seen of [the respondent judge] I did not think that he should act as a judge in a criminal case." id., 108 Nev. at _____, 837 P.2d at 856. If the Commission had elected to pursue the respondent judge in Stuhff as it has in the instant matter, a special prosecutor would have been appointed who, "in a confidential setting," would have interviewed numerous judges and attorneys in an effort to prove that the respondent judge was unfit to preside over criminal trials.

The investigation that has occurred in the instant matter over a period of months and in a method calculated to locate additional sources and areas of complaint, is a far cry from a preliminary investigation as contemplated by the Nevada Constitution and as provided under the Rules. It represents an all-out effort to selectively prosecute the Petitioner for reasons known only to the Commission and those such as Mr. Campbell who have been so heavily involved in the proceedings. Confidentiality has been a hollow word to Petitioner whose apparent difficulties with the Commission have been voiced to any number of persons in the name of "preliminary investigation." Notwithstanding the unauthorized procedures heretofore noted, there are more compelling reasons why the

so called complaint against the Petitioner must be dismissed and stricken.

3. Rule 11 provides the grounds that will support an exercise of jurisdiction by the Commission in imposing discipline on a judge. In that regard, it is both necessary and revealing to analyze the content of Ms. King's complaint. It appears that Ms. King's charges are the product of the "investigation" conducted by special prosecutor Campbell.[1] Mr. Campbell has, over a prolonged period, sought witnesses who would substantiate Ms. King's charges that Judge Whitehead does not pay proper respect to the law or fails to promote public confidence in the judiciary.

RULE VIOLATION: Both Mr. Campbell's investigation and Ms. King's complaint completely fail to present a case

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[1] Mr. Campbell on some occasions styles himself as "special counsel to the Commission." The Rules, of course, contain no provision which permits the Commission to retain "special counsel" at this stage of the proceedings. The attorney general is acting as counsel for the Commission, and the record shows that Mr. Campbell's function has been to try to construct a "case" against Judge Whitehead. In doing this he has (we are told) engaged in "completely inappropriate behavior" in the form of "browbeating witnesses" and insisting that they not communicate the contents of his interviews to others (see, e.g., Affidavit of Donald Namura). Judge Gamble tells us that when Mr. Campbell interviewed him, Campbell was biased against Judge Whitehead, "disrespectful to Judge Whitehead as a person and as a judge." Judge Gamble tells us that "Mr. Campbell took every opportunity to castigate Judge Whitehead and to characterize Judge Whitehead's actions as though they were something vile and malignant." It was clear to Judge Gamble that "Mr. Campbell was attempting to influence (his) opinion about Judge Whitehead's actions rather than simply requesting information about my experiences with Judge Whitehead." This same Mr. Campbell now asks this court to keep his interviews and investigations secret based on some kind of privilege. We can conceive of no honest motives for investigator Campbell's refusal to disclose the names of the phantom witnesses upon whose interviews Ms. King's complaint are apparently based. Until such time as a justiciable complaint is filed and probable cause found, it is clear that Mr. Campbell may no longer continue to act as "special counsel" to the Commission.

upon which the Commission can act. Let us examine the King/Campbell charges appearing in the complaint.

Count One, without any stated basis in fact, charges that Petitioner "intentionally embarked upon a scheme" to "deter and punish" some unnamed "counsel" from exercising peremptory challenges. This charge must be ignored. There is no prohibition in the Code against "scheming" or other similar thought processes. Mr. Campbell has refused to provide Petitioner with the names of his accusers. Apparently, Campbell would not even tell Ms. King who Petitioner was "scheming" against or she could have insisted that Campbell include their names in the complaint drafted by Campbell on her behalf. This count is utterly without merit and states no charge that would support an order of discipline.

Count Two. This count charges that, after Petitioner was peremptorily challenged (and after, presumably, he was no longer the judge in the case), he telephoned one of the attorneys in the case and asked him to suggest a new judge.

This is a good point at which to address the administrative nature of Ms. King's complaint. As seen by the footnote below, the administrative methodology at issue here in the peremptory challenge process was commonplace during the period covered by Campbell's investigation and Ms. King's complaint. We have adopted an administrative rule change to address and make uniform the procedures for reassigning cases after a judge has been peremptorily challenged. Petitioner's practice as described in the complaint, if true, reflected an administrative policy employed by other judges prior to the recent amendment of our rule.[2] Petitioner cannot possibly

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[2] In dealing with this administrative problem, this court first recited the basis for amending SCR 48.1 as follows:

> On February 22, 1993, the Board of Governors of the State Bar of Nevada filed a petition requesting that at Rule 48.1 of the Supreme Court Rules be amended so as to expressly prohibit a district court judge against whom a peremptory challenge has been (continued...)

have been guilty of a violation of the Code by reason of the charged conduct, even if it were true.

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[2](...continued)

made from contacting the party making such a challenge, or the party's attorney, and to prohibit the challenged district court judge from communicating with the district court clerk with regard to reassignment of a case following a peremptory challenge.

Thereafter, this court solicited input and received numerous responses from members of the judiciary and the state bar concerning the proposed amendment to SCR 48.1. A review of those responses reveals that a problem or potential problem exists throughout the state with regard to ex parte communications initiated by the challenged judge, and the challenged judge's involvement in the reassignment of the case, following the filing of a peremptory challenge. Accordingly, we conclude that the amendment of SCR 48.1 is warranted.

(Emphasis added.)

In view of the history recited above, this court amended SCR 48.1 in pertinent part as follows:

2. . . . Within 2 days of the notice of peremptory challenge having been filed, the clerk of the court shall:

(a) In a judicial district in which there are more than two departments, randomly reassign the case to another judge within the district;

. . . .

6. [The judge against whom a peremptory challenge is filed shall transfer the case to another department of the court, if there is more than one department of the court in the district . . . .] (bracketed provision, was deleted). The judge against whom a preemptory challenge is filed shall not contact any party or the attorney representing any party, nor shall the judge direct any communication to the clerk of the district court with respect to reassignment of the case in which the peremptory challenge was filed.

The above amendment was dated the 17th day of June, 1993, and became effective 60 days after its entry.

Count Three. This is another charge relating to administrative practices engaged in before we adopted an amendment to Rule 48.1 to cover the area under discussion. In this charge, Petitioner is again said to have engaged in practices comparable to those charged in Count Two, after he had been challenged and was no longer the judge in the case. There is no substance to this charge.

Counts Four and Five. These counts charge that Petitioner expressed his opinions concerning peremptory challenge practices while addressing attendees at "Bridge the Gap seminars." [sic] This charge criticizes the Petitioner for leaving "open the possibility that the exercise of a peremptory challenge against him could result in an unfavorable assignment to a new department." These are hardly charges which can support disciplining Petitioner on the grounds of "willful misconduct." It seems unworthy of note that expressing one's opposition to a supreme court rule is not misconduct. With the greatest restraint, we merely note that these counts give new meaning to the term "meritless."[3]

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[3] At this juncture, we should remind the reader that ARJD provides that the Commission "has no jurisdiction" in cases in which "differences of opinions of judges as to matters of law or policy" are concerned. Petitioner had an opinion relating to the opinion of other judges, and as it appears from our recent amendment to Rule 48.1, contrary to the opinion of this court. Nevertheless, Petitioner was free to express his opinion then as he is free to express it now. Since the effective date of the referenced amendment, Petitioner and all other judges of his persuasion or view are bound to follow the procedure provided by the amendment. This matter has been addressed administratively by this court, and both the amendment and the recital preceding its adoption should make clear that the procedures attributed to Petitioner, if true, do not constitute a basis for Commission jurisdiction regarding Petitioner or any other of the judges who engaged in the practice prior to the effective date of the new amendment.

Counts Six and seven. Two more peremptory challenge charges comparable to those discussed above, that are equally meritless.

Counts Eight Nine and Eleven relate to supposed "ex parte" contacts with a friend of the Petitioner, one Ernest Martinelli, after Petitioner had been removed from a case by peremptory challenge.[4] The specific charge is that Petitioner's conduct was "in keeping with neither the spirit nor the letter of SCR 48.1, and, indeed, was calculated to chill the legitimate rights of the parties." These charges, in the main, object to Petitioner's expression of opinion as to how he believes the practice of making peremptory challenges ought to be carried out. These counts also lack merit or a basis for Commission jurisdiction.

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[4] Campbell contends that Petitioner's conclusion that he no longer had jurisdiction in any of the referenced cases after he was peremptorily challenged is without merit because Petitioner still had jurisdiction to determine whether the challenge was timely. See Nevada Pay TV v. Eighth Judicial Dist. Court, 102 Nev. 203, 719 P.2d 797 (1986). Campbell's contention is unavailing in the context of the complaint filed against Judge Whitehead. It is in fact clear that in the event the challenges were timely, Petitioner would have been automatically divested of any jurisdiction other than the administrative duty to reassign the case to another department of the court. To conclude that a cognizable charge has been specified in the complaint on the assumption that one or more of the alleged ex parte contacts may have occurred with regard to a case where the challenge was untimely is patently without merit.

A valid complaint is not based upon assumption. To illustrate the point, Campbell's position is akin to arguing that the state could file a valid criminal information charging a defendant with murder on grounds that he may not be able to prove that the killing occurred in self defense. The Commission, with all of its investigation in this case is not in a position to assume that improper ex parte contacts were made concerning a pending case because the peremptory challenge may have been untimely. Moreover, the argument makes little sense in the face of Petitioner's alleged reluctance to reassign cases from his court based upon peremptory challenges.

Count Twelve charges that Petitioner criticized an attorney. There is no conceivable basis for a willful misconduct charge contained in this count.

Because none of the twelve counts contain any facts upon which a charge of willful misconduct could be based, Ms. King's complaint must be dismissed.

In addition to the rule violations addressed in part above, this court has other concerns related to this proceeding. We have ordered the Commission to "explain the authority by which it has summoned non-complaining witnesses before a finding of probable cause has been made and thereby, of necessity, violating the confidentiality of the proceedings before the Commission." No satisfactory answer to this question has been given by the Commission, and we are aware of none.

This case is extremely perplexing. We understand that the Commission has a difficult and important mission to fulfill. we also understand the necessity of maintaining the vitality of an independent judiciary. In the instant matter, it is clear to this court that a concerted, dedicated and highly inordinate effort has been marshalled in order to assure the prosecution of the Petitioner. The grounds resulting from the lengthy investigation may indeed attest to the integrity of the Petitioner given the extent of the resources and time committed to develop charges upon which to proceed against him. When compared with other matters considered by the Commission over the past months, the charges against Petitioner are paled by the comparison. This is worrisome as it tends to suggest that forces are at work that are inconsistent with the bona fides to be expected and demanded from the Commission.

The Commission has hired or otherwise agreed to the appointment of a special investigator, more aptly described as a special prosecutor, without any apparent authority for doing

so, to go out and develop a case against Petitioner. In attempting to make this case, the investigator has reportedly threatened witnesses and, in the guise of "special counsel," has done everything in his power to create a bias in the Commission against Petitioner. Most alarming is the investigator's refusal to disclose to Petitioner the nature and content of his investigation. Apparently at Campbell's instance, the Commission refuses to disclose the names of Campbell's witnesses or the contents of their statements. If we were to allow this disciplinary proceeding to continue, something we could not possibly justify, Petitioner would be placed in a position where he would have precious little basis for responding to Ms. King's charges that he has not had respect for the law and has failed to "promote public confidence" in the judiciary. The Commission and its special prosecutor have refused to tell Petitioner what witnesses were used to support the surrogate complaint by Ms. King or to tell him the factual basis for the disciplinary action against him. The Commission's refusal to answer our order addressed to it and its refusal to disclose <u>everything</u> that was considered in deciding to hold a probable cause hearing," represents an unauthorized election which not only prevents Petitioner from having his rightful opportunity to present a defense, but is also an affront to this court. On this ground, also, we order the complaint dismissed.

This case presents a serious miscarriage of justice. Overlooking leniency accorded in situations where serious discipline may have been warranted if jurisdictional requisites had been followed, the Commission has invoked what appear to be almost unlimited resources to pursue disciplinary measures against Petitioner because of his policy and views on the subject of how peremptory challenges ought to be handled administratively. The Commission, completely out of control, has hired a special prosecutor and provided him with what appears to be a mandate to take whatever time and effort is necessary to develop some kind of colorable case against Petitioner. Indeed, counts two and three of the complaint

represent allegations of misconduct dating back to 1986 and 1988, respectively.

This case would be all the more frightening if it had not been so ineptly handled. Apparently, neither the Commission nor prosecutor/investigator Campbell took the time or trouble to read the Rules. Campbell's attempt to justify the procedures utilized against Petitioner by citing precise compliance with the procedures in Goldman, appears at best to be an unwitting admission of marching to obsolete orders, and at worst a revelation of willingness to resort to any and all measures to achieve a predetermined end. In any event, we could never countenance the ad hoc, draconian procedures adopted here--hiring an investigator to build a secret case to present to Ms. King so that she could file an unauthorized complaint without named complainants. Add to this the Commission's refusal to disclose the names of the true accusers or the contents of their accusations and we reach a level of official abuse that is of intolerable proportions.

We have carefully reviewed all other aspects Of the Complaint and the arguments of Commission's special counsel and conclude that they need not be discussed as they are also without merit. We have also determined that oral argument concerning the petition and Petitioner's entitlement to relief would be of no assistance to the court.

Given the foregoing IT IS ORDERED:

1. Ms. Eve King's "Complaint Seeking Determination of Probable Cause" is dismissed.

2. The Commission on Judicial Discipline and Donald Campbell are hereby ordered:

   a. To deliver to this court all statements (including "work products"), notes, and any written record of any kind relating

to all disciplinary proceedings against Judge Whitehead.

b. To disclose forthwith to this court all expenses of any kind, whether paid or not, and whether presently owing or not, relating in any way to the investigation and prosecution of Judge Whitehead.[5]

ROSE, C.J.

STEFFEN, J.

SPRINGER, J.

SHEARING, J.

GUY, D.J.

[5] The Honorable Cliff Young, Justice, was disqualified to serve on this case by reason of his current assignment as a member of the Commission.

## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 21st day of December, 1995, I served a copy of the foregoing PETITION FOR A WRIT PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS by placing said document in the U.S. Mail, postage prepaid, addressed to:

Chief Justice Thomas L. Steffen
Nevada Supreme Court
Capitol Complex
Carson City, NV 89710

Justice Charles E. Springer
Nevada Supreme Court
Capitol Complex
Carson City, NV 89710

Senior Justice David Zenoff
c/o Administrative Office of the Courts
Capitol Complex
Carson City, NV 89710

Herbert F. Ahlswede
Special Master
c/o Administrative Office of the Courts
Capitol Complex
Carson City, NV 89710

/s/ REBA COOMBS

**APPENDIX B**

[Filed Dec. 22, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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RESPONSE OF JUSTICE CHARLES E. SPRINGER
TO ATTORNEY GENERAL'S PETITION
TO PROHIBIT INVESTIGATION OF
ATTORNEY GENERAL'S OFFICE

AND

MOTION TO DISQUALIFY JUSTICES
YOUNG, ROSE AND SHEARING

As one of the respondents above named, Justice Charles E. Springer responds to Attorney General Frankie Sue Del Papa's[1] Petition in the following manner.

I.

## GENERAL STATEMENT OF OPPOSITION TO PETITION

The Attorney General is seeking an ex parte "stay" of the investigation into her office. Because the investigation to-date has gone far beyond contempt of court and the intentional, wrongful disclosure of confidential materials relating to judicial discipline proceedings and because the Attorney General is seeking an immediate "stay" of the investigation[2] into her office and into possible official misconduct by others, I conclude that it is urgently necessary for me to respond immediately to the petition and to file an opposition to any request for a "stay" of the investigation. I do this principally [sic] because I fear that three justices of this court might, without a hearing or other opportunity to oppose the petition, come to the false conclusion that they had the power to order me and other members of the Whitehead panel to

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[1] Frankie Sue Del Papa, as Attorney General, is the official legal counsel for me and for the other named respondents. That she would sue her "clients" in this way presents an arguable conflict of interest and certainly leaves respondents without legal representation.

[2] It has been argued by the Attorney General that the court has no authority to appoint a special master to investigate matters relating to contempt of court. I refer those who challenge the legality of the investigation to NRS 1.210:

> Every court shall have power: . . . (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

(emphasis added).

discontinue the investigation now in progress. Briefly put, the grounds for my opposition are:

1. Justices Young, Rose and Shearing are disqualified to act in this case because:

   a) Justices Young and Rose are disqualified from the underlying case and are not qualified to issue orders which overrule the law of the case and the duly-entered decisions and judgments of the Whitehead court.

   b) Justice Rose has identified Justice Shearing as one of the objects of the ongoing investigation; and it would, accordingly, give an appearance of impropriety for her to try to stop the investigation.

   c) Justices Young, Rose and Shearing are potential targets of the investigation.

2. The Attorney General's petition is substantively invalid because:

   a) The invalid administrative order mentioned in her petition (that is, the order purporting to reverse an order of the Whitehead panel and terminate the investigation) is void and has been declared void by a properly-entered opinion and decision of this court dated December 15, 1995.

   b) The Attorney General has alleged no specific, remediable injury to herself that would give her standing to file such

a petition. That the investigation is seeking information regarding official misconduct relating to contempt of court is not an "injury" to the Attorney General that is subject to redress. No public funds have been employed by the Special Master to date; but even had public funds been used to perform a constitutionally-mandated duty, this would not be an "injury" to the Attorney General.

3. The Attorney General's petition is procedurally invalid on its face because:

a) The Attorney General has chosen a remedy that is not available to her. Prohibition[3] runs to "inferior tribunals" that are acting in excess of their powers. There is no inferior tribunal identified in her petition. Mandamus[4] is available only to compel performance of a duty required by law; this is not the relief sought in the petition. It is legally impossible for either writ to be granted by this court.

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[3] "The writ [of prohibition] may be issued only by the supreme court to an inferior tribunal" or others who are "exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal . . . ." NRS 34.330; NRS 34.320. Prohibition is not the proper remedy for thwarting investigation by the court of the Attorney General's office. The court's attempt to uncover those who are guilty of contempt of court is not a "judicial function" as such.

[4] The purpose of a writ of mandamus is to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station . . . ." NRS 34.160. Obviously, mandamus is not a proper remedy here.

b) The Attorney General's petition fails to name or serve the real party at interest, namely Judge Whitehead, who was successful in having his motion for an investigation granted by the supreme court. Due process requires that notice and opportunity to be heard be granted to Judge Whitehead.

c) The Attorney General's petition fails to name the Nevada Commission on Judicial Discipline, also a real party at interest in this matter. Due process requires that notice and opportunity to be heard be granted to the Commission on Judicial Discipline.

d) The Attorney General has no standing to file the petition in question because she was not a party to the underlying action in which the investigation was ordered, and she is not counsel to either party in that action.

4. All of the issues raised by the Attorney General's petition have been decided in a true case and controversy in which a final and binding decision on has been reached. The Attorney General, having been counsel to one of the parties in the underlying litigation, is certainly bound by those decisions, namely:

a) Allegations in the petition's paragraph 5 relating to this court's appointment of a special master have been fully briefed, argued and decided.

b) Allegations in paragraph 5 relating to the supposed baseless inquisition have been duly briefed, argued and decided.

c) Allegations relating to any claimed interference with First Amendment rights have been duly litigated and decided.

5. There is no difference between a "duly-elected" court and a court constitutionally composed in a given case after disqualification of one or more of the "elected" justices and substitutions by qualified district judges or senior judges. All justices, whether elected or appointed are coequal. In that connection:

a) The "lawfully constituted authority" of the court at all times belongs to the justices who are duly authorized to preside over and decide any given case, and any attempt to exercise such authority by a disqualified justice is unlawful and unconstitutional.

b) No person, whether a public official or otherwise, has a right to thwart a lawful investigation into possible contempt of court or other official misconduct relating to judicial functions.

c) There is no allegation that the Master's investigation is in any way being conducted in an unlawful manner.

6. In addition to the clear procedural and substantive defects mentioned above, it is clear that Justices Young, Rose and Shearing do not have

the capacity to act on this petition. Justices Steffen and Springer are parties to the case. Consequently, there will be no justices qualified to sit in judgment of the Del Papa petition and there could be no relief granted by the Supreme Court under these circumstances even if the petition were legally supportable.

II.

## JUSTICE SPRINGER'S SPECIFIC RESPONSE TO PETITION

In response to paragraph 1: Respondents Steffen, Springer and Zenoff did, together with a fourth jurist, after briefing and oral argument by both sides, grant a motion which resulted in the appointment of Mr. Ahlswede as a Special Master assigned to investigate possible contempt of court in the form of intentional breaches of confidentiality in the Whitehead matter. Initial investigation discloses that the misconduct being uncovered by the Special Master goes well beyond mere "leaks" to the newspapers and involves possibly serious official misconduct.

In response to paragraph 2: The "court" did not file any petition. Justices Young, Rose and Shearing filed a petition, without giving notice to any of the interested parties. The mentioned petition had, as its stated purpose, the overruling of decisions in the Whitehead case by means of an "administrative" order. It is impossible, of course, to overrule an established judicial decision in this manner.

In response to paragraph 3: On September 15, 1995, three judges signed a null and invalid order purporting to overrule decisions made in the Whitehead case. There has been no expenditure of public funds in the Master's investigation. The void "administrative" order was declared null and void

by this court in an opinion filed December 15, 1995. This is now the law of the case.

In response to paragraph 4: The Attorney General's office is the subject of a lawful Master's investigation. This fact does not constitute an "injury" which is legally redressable by this petition or by any other known legal action.

In response to paragraph 5: As stated, actions by Justices Young, Rose and Shearing purporting to reverse decisions in the Whitehead case are void and have been declared void by a lawful decision of this court. The investigation by Mr. Ahlswede to date is anything but a "fabricated and baseless inquisition into the legitimate functions of [the Attorney General's] office." The Special Master has in his possession sworn statements and documents which, at the very least, warrant further inquiry into the Attorney General's office and into the conduct of other public officials. The public has the right to have this investigation continue.

In response to paragraph 6: The Attorney General has no standing either in her official capacity or her individual capacity to sue members of this court in an attempt to thwart an investigation of her office. The Attorney General claims to have "status as the duly elected and acting legal representative of the citizens of the State" to sue members of the court in order to prevent any further investigation of her office. Such a "status," it is respectfully submitted, is not supported by the law of this State or of any state.

In response to paragraph 7: The Attorney General's charge that the unlawful breaches of confidentiality "pale[] in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents" is impertinent and unintelligible; so no response is given to these allegations.

In response to paragraph 8: The statements in paragraph 8 are argumentative and rhetorical and obviously

designed for some purpose other than the stated purpose of the petition; therefore, no answer is given.

In response to paragraph 9: This respondent denies that the Master's investigation will in any way subject the Attorney General or any other public official to an "unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights." The Master's investigation is purely and simply an attempt to get at the truth. This attempt is certainly being opposed in an extremely vigorous manner by the Attorney General.

III.

MOTION FOR DISQUALIFICATION OF JUSTICES[5]

Justice Charles E. Springer moves that Justices Young, Rose and Shearing be disqualified from acting in any way in this matter for the following reasons: (1) Justices Young and Rose are disqualified from acting in any matter relating to decisions made in the Whitehead case. (2) Justice Rose is the subject of the Master's investigation, and he has publicly identified Justice Shearing as the subject of the investigation. It would at least give an appearance of impropriety for either of these justices to act in any way in this matter. (3) Justice Rose has exhibited actual bias as reflected in his comments at the administrative hearings relating to this matter.

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[5] I note that NRAP 35 contains the requirement that certain formalities be fulfilled by attorneys who file motions to disqualify justices (e.g., that attorneys file a "certificate of the attorney" that the "attorney has read the motion.") I file this motion in my capacity as a supreme court justice; and until counsel has been made available to me in my official capacity, the formal requirements of NRAP 35 will be suspended in accordance with NRAP 2. It is my hope that Justices Young, Rose and Shearing will disqualify themselves, thereby making my pursuit of this motion unnecessary.

The legal grounds for this motion are:

1. Justices Young, Rose and Shearing are by order of this court disqualified to act in any matter relating to the Whitehead case or the Master's investigation into contempt of this court.

2. Justices Young, Rose and Shearing have an implied bias, under NRS 1.225(2) because they have an interest in the proceedings, namely, an interest in thwarting an investigation which appears to relate in some measure to the mentioned justices.

3. The impartiality of Justices Young, Rose and Shearing is reasonably subject to question under Canon 3(C)(1) because of their own apparent involvement in the investigation.

4. Justices Young, Rose and Shearing have a direct interest in the outcome of the petition, in violation of the Due Process Clause of the United States Constitution, as evidenced by their attempts to thwart an investigation which may involve their own misconduct.

5. Justice Rose has exhibited actual bias under NRS 1.225(1) and Canon 3(c)(1)(a), as evidenced by his remarks at the "administrative" meeting of December 15, 1995, and by the statements to the press. These remarks are now being gathered and will be supplied at a later date as a supplemental to this motion.

/s/ JUSTICE CHARLES E. SPRINGER

Date: December 22, 1995

## APPENDIX C

[Filed Dec. 26, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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ORDER

An original petition for a writ of prohibition or mandamus was filed by the petitioner. Although this court did not request an answer to this petition, respondent Charles E. Springer, Justice of the Nevada Supreme Court, filed a response to this petition on December 22, 1995. Justice Springer also filed a motion to disqualify Cliff Young, Robert E. Rose and Miriam Shearing, Justices of the Nevada Supreme Court, from participating in the decision of this petition.

Pursuant to NRAP 21(b), this court may summarily deny an original petition for an extraordinary writ, or this court "may enter an order fixing time within which an answer directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ may be filed by the respondents . . . ." The rule further provides that "[t]he court shall by order advise the parties of the dates on which briefs are to be filed, if briefs are required . . . ." The intent of the rule is clear, and the practice of this court has been consistent: This court does not allow answers to petitions for extraordinary writs to be filed without prior direction from this court, and at this court's discretion. Accordingly, we direct the clerk of this court to strike as unauthorized that portion of Justice Springer's response to this petition that is not part of the motion to disqualify.

We note that Justice Springer's motion to disqualify members of this court is not supported by affidavits as required by NRAP 35(b), nor is it accompanied by proof of service on opposing counsel as required by NRAP 35(d). Further, the motion is not accompanied by "a brief of legal points and authorities, setting forth specifically and under separate headings the legal basis for each ground alleged in the motion or charge," as required by NRAP 35(c). That rule expressly provides that "[f]ailure to present substantial legal authority for any ground [for disqualification of a justice] is a basis for summary denial of the motion or charge, and is a willful violation of this rule." We conclude that the motion the disqualify is procedurally and substantively deficient. Accordingly, we deny the motion.

Finally, we order special investigator Herbert J. Ahlswede to cease any further action or investigation pursuant to the "Order Appointing Special Master" entered in Docket No. 24598, or the other Opinions or Orders filed therein, pending further order of this court, whether compensated for his actions or not. We also direct the clerk of this court, the employees of the clerk of this court and all members of this

court's central legal staff not to assist Ahlswede in his investigation in any manner, including but not limited to the issuance of subpoenas, pending further order of this court.

It is so ORDERED.

/s/ YOUNG, A.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

cc: Hon. Thomas L. Steffen, Chief Justice
Hon. Charles E. Springer, Justice
Hon. David Zenoff, Senior Justice
Hon. Frankie Sue Del Papa, Attorney General
Herbert J. Ahlswede
Janette M. Bloom, Clerk of the Supreme Court
Michael K. Wall, Supervising Staff Attorney

## APPENDIX D

[Filed Jan. 29, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 24598
Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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RESPONSE TO PETITON FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

The above-named Respondents, THE HONORABLE THOMAS L. STEFFEN, THE HONORABLE CHARLES E. SPRINGER, THE HONORABLE DAVID ZENOFF, and HERBERT J. AHLSWEDE, in their official capacities only, through their undersigned counsel submit the following

Response to the Petition filed herein in accordance with the Order filed and entered on December 29, 1995.

## PRELIMINARY STATEMENT

The Order of December 29, 1995, directing a Response be filed to the Petition herein is obviously void and a legal nullity on its face since it purports to be signed by two justices who have previously been disqualified by voluntary recusal from the underlying case to which the Petition pertains, Whitehead v. Nevada Commission on Judicial Discipline, Case No. 24598 (referred to hereinafter as "the Whitehead case"). The aforementioned disqualified justices are precluded by law and ethics from acting judicially or administratively in any matter which would impact upon the Whitehead case, and therefore have no legal authority to act in this related matter.

Under direction of Justices Rose, Young and Shearing, the Attorney General's "Petition" was given a new case number in an effort to distance the fugitive "Petition" from Case No. 24598. This court has never hesitated to recognize a pleading or filed document for what it truly is, as opposed to what it purports to be by label. In the instant "Petition," it is clear that the entire subject matter contained therein addresses actions, issues, and activities firmly within the exclusive jurisdiction of the constitutionally impaneled court in Case No. 24598. The disqualified justices Rose and Young may not, under guise of a new case number, interject themselves into Case No. 24598 in an effort to overrule its orders and interfere with the lawful processes undertaken by that court.

It is clear black-letter law that a disqualified judge "loses, and must surrender, his jurisdiction, and that thereafter he is without authority to act further in any judicial capacity in connection with the action or proceeding in question, except to make the proper transfer of the case or take the appropriate steps for the selection of another judge. 48A C.J.S. Judges,

§ 155, pp. 860-61. Indeed, as early as 1886, this court recognized and held that when plaintiffs sought an extension of time within which to file amendments to a motion for a new trial from a judge who was disqualified to sit in the same case,

> [t]he application to the judge, who was disqualified, might as well have been made to a stranger having no authority to act. If it had been granted, the order would have been absolutely null and void. Under these circumstances, the case must be treated as if no application had been made for any extension of time to file amendments.

Frevert v. Swift, 19 Nev. 363, 365, 11 P. 273, ___(1886).

As held in Frevert, this "Petition" must be treated by the only constitutional court authorized and empowered to act Case No. 24598, as if it had not been made, as the three justices who have rushed to entertain it, are disqualified to act, and any action they would take would be absolutely null and void. Simply stated, "a rose by any other name is still a rose," and the three justices may not do indirectly what they are prohibited from doing directly.

Aside from the fact that Justices Young and Rose are disqualified in Case No. 24598 and therefore have no authority to act in any way to interfere with the constitutional prerogatives of the duly constituted panel in that case, including any attempt to interfere with the constitutional processes in existence relating to the replacement of members of that court who are not able to continue to serve, there are compelling ethical canons that prohibit the type of chicanery that the disqualified justices are engaging in to maneuver themselves into a position of control in Case No. 24598.

Canon 3B(1) of the Nevada Code of Judicial Conduct (hereinafter all Canon references are to this Code) states that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required. (Emphasis added.) In the instant case, disqualification exists--it is not an issue. Justices Rose and Young are violating this Canon in attempting to perform judicial acts with respect to a case--No. 24598--in which ongoing disqualification is required.

Even if one were to indulge the fiction that the "Petition" in which the three justices seek to act is not inextricably related to Case No. 24598, Justices Rose and Young would clearly be disqualified to act under Canon 3E(1)(c):

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (c) the judge knows* that he or she . . . has . . . more than [a] de minimis* interest that could be substantially affected by the proceeding.

Some of the Justices are themselves suspected of being implicated in the violations of law, lawful court orders, and the obstruction and interference with the administration of justice in Case No. 24598. They therefore have a substantial interest in preventing an investigation that could pose a threat I to any aspect of their careers in the judiciary.

Canon 3B(2) provides that "[a] judge shall be faithful to the law* and . . . shall not be swayed by partisan interest, public clamor or fear of criticism." The orders entered by Justices Rose, Young and Shearing in their ongoing efforts to terminate and otherwise interfere with the constitutional

prerogatives of the court in Case No. 24598 demonstrate that they have greater respect for public clamor than the law.

Canon 2 states that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2A provides that "[a] judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The bedrock principle of American jurisprudence known as the law of the case is, of itself, dispositive of this patent attempt to circumvent the lawful pronouncements and jurisdiction of the duly constituted, constitutional panel of the Nevada Supreme Court in Case No. 24598. Disingenuously declaring that her "Petition. "does not place before the court any substantive issue in Case No. 24598," and that "[i]ndeed, all substantive issues in Case 24598 have long since been decided," she then devotes at least five pages of her "Petition" rearguing the point she raised on behalf of the Nevada Judicial Discipline Commission in Case No. 24598 before she was removed as counsel, to wit, that the orders of the duly constituted court in Whitehead requiring the confidentiality of Whitehead's petition and proceedings based thereon, were illegal and void.

Simply stated, the doctrine of the law of the case is "that principle under which determination of questions of law will generally be held to govern case throughout all its subsequent stages where such determination has already been made on a prior appeal to a court of last resort." Black's Law Dictionary 798 (5th ed. 1979). The constitutional court in Case No. 24598 considered the issue of the confidentiality of pre-probable cause petitions to this court by respondent judges (pursuant to ARJD Rule 40 (7)) at length and held that such confidentiality in this court was mandated by the Nevada Constitution and were not violative of the federal constitution. See Whitehead, 111 Nev. ____, ____, 893 P.2d 866, 884-898

(1995). However disappointed the Attorney General may continue to be in this court's rulings regarding the constitutionality of its orders of confidentiality, the issue has been firmly and finally resolved, and is the law of the case and of this jurisdiction![1]

It is, of course, patently clear why the Attorney General, after declaring that all issues in Case No. 24598 have been put to rest, now tries to enlist the support of two disqualified justices and the lone dissenting justice in the Whitehead cases, to overrule the constitutional court's ruling on the issue of confidentiality. The Attorney General's Petition now seeks a writ directed against the supreme court as it is constituted in the Whitehead case, whereby the court in Case No. 24598 would be deprived of the right to punish as contempt and otherwise, the violations of court orders and court rules.

Moreover, despite the Attorney General's attempt to declare the appointment of a special master by the constitutional panel in Case No. 24598 illegal and void, she again does so contrary to both the law of the case and the clearly lawful authority of the court. In Whitehead III we held, by a majority vote of 4 to 1:

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[1] We also note that the constitutional validity of the duly empaneled court's rulings on the confidentiality of the proceedings before it has received the support of the Board of Governors of the State Bar of Nevada, and the Nevada District Court Judges Association. Indeed, the prestigious American Adjudicature Society also observed, in its amicus brief to Case No. 24598, that under rare circumstances where a discipline commission is functioning as a "rogue commission," extraordinary writ consideration is appropriate, Whitehead V, 893 P.2d at 903, n.28, and that this court "was correct, if it were going to intervene at all, to request the Commission's papers on a confidential basis and to review them in camera." Id. at 900, n.20. The fact that the Attorney General desires to repeat her views to the contrary is of no moment, legally or otherwise.

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

Concerning the same subject, the court in Whitehead III also declared:

> It is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters. Although it is clear that we have the authority to appoint a fact-finding master to delve into the source of the violations, we are not ready at this time to define the scope of activities to be conducted in this regard. We do, however, conclude that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having the power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

110 Nev. at 890, 878 P.2d at 923.

In ruling that the court had authority to appoint a fact-finding master, we cited to Young v. Board of County Comm'rs, 91 Nev. 52, 530 P.2d 1203 (1975), which is clearly

supportive of such authority. Moreover, the Attorney General must certainly be aware that statutory authority recognizes the well-established, inherent right of courts to investigate and hold accountable those who violate or are contemptuous of a court's orders. Thus, NRS 1.210 provides: "Every court shall have power . . . [t]o enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority." (Emphasis added.)

Our ruling in Whitehead III is now the law of the case, and the time for seeking relief from the ruling through a proper petition for rehearing has long since expired.

Notwithstanding the foregoing, in light of statements made by the court in the Whitehead case, specifically Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 128, 139, 869 P.2d 795, ____ (1994), [Whitehead I], concerning compliance with void orders prior to an adjudication of voidness, the Respondents have decided to comply, under extreme protest, with the Order by filing this response, even though the order has no substantive legal validity.

## DIRECT RESPONSE TO ALLEGATIONS ENTITLED "STATEMENT OF FACTS"

1. The Respondents admit that on the date alleged, the constitutionally constituted Nevada Supreme Court in Case No. 24598 entered a valid, enforceable order containing the language alleged in paragraph 1.

2. The Respondents deny that the court filed the alleged petition on the Administrative Docket (ADKT), and allege that two strangers to the action, being justices disqualified by law and ethics to act with regard thereto, together with one justice who dissented in the action, filed a fugitive document entitled "Petition" containing the language alleged in paragraph 2.

3. The Respondents deny that the court entered an order on ADKT 221 or made any findings with regard thereto, and allege that on September 15, 1995, a sham proceeding was held by the justice who dissented in the action and two unauthorized persons in which such individuals, without authority to act in any official capacity, purported to make the findings and enter the order alleged in paragraph 3.

4. The Respondents admit that the Special Master, HERBERT J. AHLSWEDE, submitted a Report to the Nevada Supreme Court as constitutionally constituted in Case No. 24598, containing information as to the progress of the investigation he was ordered to undertake, in which he reported that substantial evidence had been discovered indicating the existence of a conspiracy to interfere illegally with the administration of justice and to violate unlawfully the law and specific orders of the Nevada Supreme Court regarding disclosure of material required by law to he kept confidential. Respondents further admit that the Special Master's Report identified the Attorney General or persons on her staff as being involved in such conspiracy and recommended further exploration of such involvement. Respondents deny that the contents of the Special Master's Report were unsupported or "insupportable," and further deny that such allegations and the continued investigation thereof will cause the Petitioner any legally recognizable "injury."

5. Respondents deny that Justices Springer and Steffen individually entered an "Opinion" and allege that the Nevada Supreme Court, as constitutionally constituted in Case No. 24598, filed and entered an Opinion on December 15, 1995, adjudging the fugitive document filed in ADKT 221 on September 15, 1995, to be a nullity and of no legal force and effect. Respondents further admit that the prior orders of the Nevada Supreme Court appointing HERBERT J. AHLSWEDE as Special Master to conduct an investigation as described in such orders, and

granting him the necessary powers and authority to effectively do so, remain in full force and effect. Respondents deny the inflammatory characterization of the authorized investigation as a "fabricated and baseless inquisition" and the characterization of the Special Master's authority as "unbridled". Respondents further deny the allegation that an investigation into unlawful and contemptuous conduct is directed at any "legitimate functions" of the Office of the Attorney General, and deny that such investigation is an interference with constitutionally protected speech of the Attorney General or others. Respondents admit that the scope of the authorized investigation may include interrogation of the members of the staff of the court.

6. Respondents deny the existence of any "competing orders," and deny that any documents purporting to be orders affecting Case No. 24598 that have been filed and entered in any action or proceeding other than Case No. 24598 were filed by "a majority of the Supreme Court". Respondents further deny that a "constitutional crises" has been created by such "competing orders," and deny that the Petitioner has been drawn into any such alleged "crisis" by reason of her office, and allege that a "constitutional crisis" exists by reason of the unlawful efforts of Petitioner and disqualified justices who are constitutionally prohibited from acting in any manner with regard to Case 24598, to abuse the naked power of their respective offices to interfere unlawfully with and obstruct the administration of justice and compliance with the valid and lawful orders entered in Case No. 24598. Respondents deny that Petitioner has any standing on her own behalf or on behalf of the citizens of the State of Nevada to challenge any orders entered in Case No. 24598.

7. The Respondents object to the scurrilous statements contained in paragraph 7 and allege the same to be unworthy of any response. Respondents cannot ascertain the meaning of the allegation referring to "self-destructive maneuvers implicated by the recent activities of the Respondents" and

therefore cannot respond to such meaningless charges. Respondents allege that an attempt to compare the impact of contemptuous and unlawful dissemination of confidential material with the impact of the abuse of official power to obstruct and interfere with the enforcement of lawful orders of the Nevada Supreme Court is immaterial and unnecessary since both types of unlawful conduct are destructive of the integrity of the judicial system.

8. The Respondents deny the allegation that the appointment of HERBERT J. AHLSWEDE as Special Master in Case No. 24598 is "symptomatic" of a crisis on the court. Respondents deny the allegation that authority to act should be restored to elected members of the court who are legally disqualified, and deny the existence of any conflicting valid orders. Respondents deny that the rights of Petitioner or any other persons will be violated by compliance with the lawful orders of the court.

9. Respondents deny that Petitioner is without an adequate remedy at law, deny that the lawfully-ordered investigation by the Special Master is an "inquisitional process," deny that such investigation is an "unconstitutional and unlawful interference with the orderly operation of [Petitioner's] office," and deny that due process or other federal constitutional rights are being violated by the Special Master's investigation. Respondents further deny that the Special Master's investigation constitutes an "abuse of power".

## DEFECTS IN THIS PROCEEDING

In addition to their responses to the specific allegations contained in the "Statement of Facts" set forth in the Petition, Respondents further respond that there are inherent defects in this proceeding which require that it be summarily dismissed.

1. The extraordinary writs of mandamus and prohibition are not authorized for the purposes set forth in the Petition.

a. The writ of mandate is specified by NRS 34.160 to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. . . ." The Petition herein does not seek such relief, and there are no allegations that any of the Respondents have failed to perform any duty resulting from their offices as supreme court justices or as Special Master to carry out an investigation. The Petition merely seeks to overrule judicial decisions made in the performance of the duties of the Respondent justices, and to restrain the Special Master from performing the duties enjoined upon him by his appointment.

b. The writ of prohibition is specified by NRS 34.320 to be for the purpose of "arrest[ing] the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person". There are no allegations in the Petition in the instant proceeding that the orders entered by the court in Case No. 24598 are without or in excess of the jurisdiction of the court, or that the Special Master has taken any action which is without or in excess of the jurisdiction conferred upon him by the court.

c. The Petition in the instant case only alleges that the decisions rendered by the Nevada Supreme Court in Case No. 24598 are legally erroneous. A plain, speedy and adequate remedy for the making of such allegations and contentions is provided in NRAP Rule 40, authorizing a petition for rehearing. The failure to file a timely petition for rehearing in Case No. 24598 precludes reconsideration of the decisions made in thatcase in any other proceeding.

2. The Petitioner is without standing to prosecute the Petition in the instant case.

a. The Petitioner was not a party to the action, Case No. 24598, to which the instant Petition pertains.

b. The Petitioner, as Attorney General, has no constitutional authority to initiate or prosecute this Petition on behalf of "the citizens of the State of Nevada" as she claims, since there is no existing case or controversy involving the matters set forth in the instant Petition to which the "citizens of the State of Nevada" as a class are parties or in which the Attorney General has been authorized to appear for the "citizens of the State of Nevada" as a class.

c. The Petitioner is directly violating an order of this court by appearing in this action for the purpose of affecting Case No. 24598. In Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 890, 878 P.2d 913, ____ (1994) the Nevada Supreme Court specifically ordered:

> 1. The Attorney General andher staff, and Special Deputy Attorney General Donald J. Campbell shall be, and the same hereby are removed as counsel to the Commission in the instant proceeding, and the Attorney General and her staff shall hereafter take no part or assume any role in disciplinary matters brought before the Commission.

(Emphasis added.)

d. The Petitioner, as Attorney General, is constitutionally required to act as counsel for the Respondents when they are sued in their official capacity, thereby creating a direct conflict of interest which precludes her from bringing an action against them.

e. The Petitioner alleges no legally redressable injury to herself in her individual or official capacity which creates a justiciable case or controversy.

3. Procedural defects preclude consideration of the Petition in the instant case.

a. The Petitioner has failed to Join and serve the real parties in interest in the action to which the Petition in the instant case pertains. NRAP Rule 21(a) states in relevant part:

> Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the Supreme Court with proof of service on the respondent judge or judges and on all parties to the action in the trial court. . . .

(Emphasis added.)

b. The fact that NRAP refers to the "trial court" further demonstrates that an application for a writ of mandamus or prohibition directed against justices of the supreme court is not authorized by law.

c. The purported order directing a response was not served upon the real parties in interest. NRAP Rule 21(b) states in relevant part:

> The order shall be served on respondents, **all other parties to the action** in the trial court **and all other persons directly affected**. All parties below other than the petitioner shall also be deemed respondents for all purposes.

The real parties in interest in the original proceeding in this court are The Honorable Jerry Carr Whitehead

as Petitioner, and the Nevada Commission on Judicial Discipline as Respondent.

4. The relief sought by the Petition in the instant case is precluded as a matter of law by the doctrines of "law of the case" and "res judicata".

AUTHORITIES IN SUPPORT OF RESPONSE

The purported "Order" of December 29, 1995, directing a response be made to the Petition in the instant case requires the submission of authorities in support of such Response, which are submitted herewith.

**A. THE EXTRAORDINARY WRITS OF MANDAMUS AND PROHIBITION ARE NOT APPROPRIATE REMEDIES FOR THE RELIEF SOUGHT BY PETITIONER.**

The nature of the extraordinary writs of mandamus and prohibition is that they are directed to inferior tribunals, boards and persons. NRAP Rule 21 specifically contemplates that any application for a writ of mandamus or prohibition against a Judge or Judges refers to a judge or judges of a "trial court". There is no provision in NRAP Rule 21 which authorizes an application for an extraordinary writ against a "Justice". There is no provision in the law which authorizes any court to entertain an application for an extraordinary writ against itself or one of its members. See Jennett v. Stevens, 33 Nev. 527, 111 P. 1025 (1910), wherein the supreme court held that one district judge could not direct a writ of mandamus to another district judge, stating that such a situation is contrary to the principle of the law of mandamus, which presupposes a superior authority to command the doing of a particular act enjoined by law. In the case at bar, the authority of the Respondent justices is equal to the authority of the dissenting Justice, and the disqualified justices have no authority at all.

Therefore, an application for an extraordinary writ is not authorized by law.

Further, an extraordinary writ is not appropriate when there is a plain, speedy and adequate remedy at law. The relief sought in this proceeding is a determination that the orders entered in Case No. 24598 were erroneous. There is no contention that they were without or beyond the jurisdiction of the supreme court, or that in entering such orders, the supreme court failed to perform a duty enjoined upon it by law. Any contentions of error in the making of such orders were addressable by a petition for rehearing pursuant to NRAP Rule 40. No application for a rehearing was made in Case No. 24598, and the time to do so has long expired. There is no provision in the law which empowers the supreme court to rehear or redetermine in a collateral proceeding matters already decided by the court.

The issues raised in the subject Petition should have been raised, if at all, in Case No. 24598, in the form of a petition for rehearing. Such a petition is at present untimely and could not be filed at this juncture. An effort to circumvent the requirements of NRAP Rule 40 by seeking rehearing through an extraordinary writ proceeding is an abuse of the extraordinary writ procedure and is completely unauthorized by law.

**B. THE PETITIONER IS WITHOUT STANDING TO INITIATE OR PROSECUTE THIS PETITION.**

In order to have standing to prosecute an action, a party must demonstrate an interest and a legally redressable injury, neither of which is shown by the allegations of the Petition in the instant action. The Attorney General of the State of Nevada has not a party to the underlying action, Case No. 24598, and is not aggrieved by the orders which are challenged in the instant Petition.

Although the Attorney General alleges that she is being "injured" in the performance of her duties and in her office by the challenged orders, she does not allege any facts

demonstrating such alleged "injury." The challenged orders direct the conduct of an investigation into unlawful and contemptuous conduct interfering with the administration of justice and the integrity of the supreme court. The Attorney General as a state official is not aggrieved by an investigation into unlawful conduct. If she has personally engaged in unlawful or contemptuous conduct, or if members of her staff have done so, she may suffer consequences by the revelation of such wrongdoing, but that is not an injury for which the law provides a remedy. All persons, including public officials, are expected to be responsible for the consequences of their conduct. It would be contrary to public policy and the interests of justice to permit such a wrongdoer to have standing to use the processes of the court to conceal and coverup such wrongdoing by obstructing and interfering with a lawfully ordered investigation into such conduct.

Although the Attorney General claims to be acting as the "representative of the citizens of the State of Nevada" in bringing this Petition, such mantle has not been bestowed her by the constitution and laws of this State. Her self-anointment - as the spokesman for the citizenry of this State does not confer standing upon her to prosecute a class action petition for an extraordinary writ pertaining to a roceeding to which the "citizens of the State of Nevada" as a class are not a party. Class action proceedings are governed by NRCP Rule 23 which is made applicable to mandamus proceedings by NRS 34.300, and it is clear that the bringing of this proceeding on behalf of the citizens of this State as a class is not authorized.

In addition, the Attorney General is precluded by conflicts of interest from proceeding as Petitioner in this action. The duties of the Attorney General are those prescribed by Law (Nevada Constitution, Art. 5, § 22), and are defined by legislation. (Ryan v. Eighth Judicial District Court, 88 Nev. 638, 503 P.2d 842 (1972)). Included among such duties are the duty to act as counsel to state officials, including supreme court justices, when they are sued in their official capacities. Such duty constitutes a direct conflict of interest precluding the Attorney General from herself bringing an action against justices of the supreme court acting in their official capacities.

See Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 884, 878 P.2d 913, ___ (1994), wherein the court stated:

> Another conflict is presented by the fact that the Attorney General is the official legal representative of the judges and justices in this state and cannot, by the nature of that office engage in the prosecution of the very judges that the Attorney General represents as counsel.

Further, as set forth above, the Attorney General is precluded by specific court order entered in Whitehead v. Nevada Commission on Judicial Discipline, from assuming any role in connection with judicial discipline proceedings. As Petitioner herein, she is attempting to affect Case No. 24598, a case involving judicial disciplinary matters brought before the Commission, and the very case in which the order precluding her from assuming that role was entered. The bringing of this Petition may itself be a direct contempt of the supreme court.

**C. PROCEDURAL DEFECTS PRECLUDE CONSIDERATION OF THIS PETITION.**

The procedural defects set forth in the direct response to the allegations of the Petition above are self-evident and require no further citation of authority other that that already cited in such response. The failure to join and serve the real parties in interest in this proceeding is fatal to the proceeding since they are necessary to an adjudication of the issues raised herein. The motion for an investigation made in Case No. 24598 was made by Petitioner in order to protect rights and interests guaranteed and protected by due process of law. Such motion was granted after extensive briefing and argument in which the Petitioner participated. In addition, the unlawful disclosures of confidential material which are the subject of the investigation directly impact the interests of the members of the Nevada Commission on Judicial Discipline, since they, with others having access to such material, remain as potential suspects in such illegal conduct until and unless

they are cleared by such investigation. They are thus necessary and indispensable parties to this proceeding, (NRAP Rule 21; NRCP Rule 19) and this court, even if otherwise validly constituted (which it is not) would be without jurisdiction to proceed in their absence.

**D. ALL ISSUES RAISED IN THE PETITION IN THE INSTANT CASE HAVE BEEN FULLY ADJUDICATED BY ORDERS OF THE SUPREME COURT WHICH HAVE BECOME FINAL.**

The Petition in the instant case does not challenge the jurisdiction of the supreme court to issue the challenged orders in Case No. 24598, but rather alleges that such orders violate the constitutionally protected freedom of speech of the Attorney General and others, that such orders arise from an error in imposing confidentiality on the proceedings in Case No. 24598, and that the supreme court is not authorized to appoint a master to conduct a judicial investigation of unlawful and on contemptuous conduct in connection with its proceedings. These issues were all raised and specifically adjudicated in Case No. 24598, in rulings contrary to the position of the Attorney General. In fact that she disagrees with such decisions does not permit her to relitigate them.

The doctrine of "law of the case" requires that decisions finally made in the case become the law of that case for all subsequent proceedings related thereto. The doctrine of "res judicata" requires that issues which have been litigated on their merits between the same parties and which have become final can not thereafter be relitigated. (See Pulley v. Preferred Risk Mutual Insurance Co., 111 Nev. _____, ___ P.2d _____ (Adv. Op. 89, June 27, 1995), discussing the requirements for application of the doctrine of res judicata). In this proceeding, the real parties in interest, although not named, are the same, and the nominal parties were all participants in the original action. The issues now raised in the instant Petition are identical to those decided in Case No. 24598, and such issues were fully briefed, argued and decided on their merits in Case No. 24598. All requirements for the application of the doctrine of res judicata are thus present

herein, precluding any relitigation of such issues in this proceeding.

## E. THERE IS ONE SUPREME COURT

The Attorney General does not reach the issue of this case until her conclusion, where she correctly states that there is only one Supreme Court of Nevada. This truth contradicts the petition, which seeks to have the Court divide itself into two parts so that one might overrule the other. The petition rests on the allegation that "Respondents (sic) conduct is in excess of their lawful authority as the orders of secrecy were invalid, and therefore, void." This issue, along with all others raised by the petition, has already been decided by the one and only Nevada Supreme Court. The Attorney General pretends to sue individual members of the Nevada Supreme Court, but she sues the Court itself. She asks for a writ of prohibition to have the single, undivided, Supreme Court reverse its published decision. If the Court were to even consider her petition, it would set a self-destructive precedent. No decision made by a court with substituted Justices could ever be considered final. Indeed, if there is a new "panel" with authority to throw out decisions of an old "panel," any time new robes are fitted, no decision could ever be considered final.

There is no mechanism whereby the Court may reconstitute itself on a case by allowing disqualified Justices to rehear a decision. The present petition asks the Court to do something it has no power to do, seeks to divide it into two parts, seeks to destroy the finality of decisions, seeks to destroy the Court itself, and violates the Attorney General's constitutional duty to avoid conflicts of interest. NRS 281.421(b).

We are presently unable to state with certainty where and to whom the investigation might lead. We do know, however, that the "interim findings" are neither "unsupported" nor insupportable." Assuming that the object is to defend the integrity of the Court in both the short and long terms, there is only one rational decision the Court can make. The Court

must affirm that there is only one Nevada Supreme Court. If, instead, it concludes that its decisions are good only until the robes are hung, it will hang itself.

### F. THE PETITION CANNOT BY ADJUDICATED WITH OUT ALLOWING REASONABLE DISCOVERY

The petition alleges that a Nevada Supreme Court majority opinion was the result of personal considerations and in that contempt of court interim findings are "unsupported and insupportable" and are causing Petitioner injury. Petitioner alleges that the investigation is "fabricated and baseless" and interferes with constitutionally protected speech, that the investigation is inquisitorial," that the Respondents are "bent on self-vindication and retribution," and that the investigation is "punitive" and "an unyielding campaign of vengeance". Unverified newspaper stories are cited throughout in support of these allegations.

The petition also rests on the premise that the Petitioner is free of any suggestion of complicity in the actions that are the subject of the investigation and therefore does not have a direct conflict of interest in requesting that the investigation be quashed.[2]

The petition rests on the further premise that all members of this Nevada Supreme Court are free of any suggestion of complicity and would not themselves engage in a conflict of interest by entertaining this petition.
Nevertheless, Petitioner maintains that she presents "purely legal issues" and asks this court to "[e]nter an order setting an expedited scheduling order for briefing and submit the case for decision on the briefs". This contradiction is at the heart

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[2] The aim of the petition is to keep the Attorney General's complicity secret from the people of the State of Nevada, whom she purports to represent in this very petition. The Attorney General complains of "secrecy," but wants it now for herself.

of the matter. Petitioner must have the court accept her allegations and assumptions without discovery, for discovery will reveal them to be untrue. This court could not decide the merits of the petition, assuming it otherwise lawful, without allowing reasonable discovery.

Nevertheless, Petitioner maintains that she presents "purely legal issues" and asks this court to "[e]nter an order setting an expedited scheduling order for briefing and submit the case for decision on the briefs". This contradiction is at the heart of the matter. Petitioner must have the court accept her allegations and assumptions without discovery, for discovery will reveal them to be untrue. This court could not decide the merits of the petition, assuming it otherwise lawful, without allowing reasonable discovery.

Even were there a mechanism for such a collateral challenge to a decision of the court on the ground that the majority opinion was influenced by personal considerations, it could not be sustained by consideration of the bare allegations and newspaper clippings.

The members of this court who recused themselves until. They became subjects of the investigation cannot order the investigation to cease in any event. Were they to go so far as to grant the petition without allowing investigation of the facts that would contradict the petition, they would not only forfeit any pretense of justice and due process of law, but would themselves engage in a conflict of interest of unprecedented magnitude.

## G. THE ATTORNEY GENERAL MAY NOT PROSECUTE HERSELF.

The Attorney General maintains that the executive branch, i.e., the Attorney General and the District Attorneys under her supervision, are available to investigate and prosecute the Attorney General and those working with her for contempt of court. This, of course, is absurd. This court has exclusive jurisdiction over contempt of its body, which it may both investigate and decide.

Based upon the foregoing authorities, the Petition in the instant case is not legally cognizable, and should be summarily dismissed.

## DISCLOSURES REQUIRED BY ORDER DIRECTING RESPONSE

In addition to requiring a response to the Petition, the purported "Order" filed December 29, 1995, also requires the Respondents to make certain disclosures. The Respondents make such disclosures under extreme protest, since the signatories to such order have no authority to require such disclosure, and such disclosures may be harmful to the continued investigation of the Special Master.

1. Disclosure as to Compensation of the Special Master.

The Special Master was appointed by lawful order of the supreme court and is entitled to be compensated in accordance with such order. However, after the Special Master undertook to commence such investigation in a good faith effort to comply with the mandate of his appointment, his compensation was cut off by a purported Order filed by two justices with no authority to act at all and one justice who dissented from the order of appointment. At that time, the Special Master offered to proceed without compensation, but the Respondents, Thomas L. Steffen and Charles E. Springer, felt it would be unfair and l unjust for him to do so. Said Respondents each advanced $750.00 of their personal funds to the Special Master to compensate him for work already performed, until the State of Nevada honored its financial obligation.

2. Results of Investigation and Evidence Acquired.

The Respondents have heretofore made such disclosures and lodged the evidence with the Clerk of the court.

## CONCLUSION

This "Petition," although assigned a different case number, is nothing short of an illegal attempt to overrule critical, substantive rulings in Case No. 24598. As such, it further compounds the ongoing attempts to cover up the most serious of wrongdoings in Case No. 24598. It is a blatant attempt to deprive the citizens of the State of Nevada of their right to know the truth, about Case no. 24598, which truth is vital to maintaining public respect for the judicial branch of government, to preserving the independence of the Nevada judiciary, and to exposing corruption in Nevada government. All Nevada citizens who have an interest in honest government, must surely ask why Petitioner and the three justices (the lone dissenter and the two disqualified justices in Case no. 24598) are so resolutely attempting to thwart and prevent an investigation and revelation of the truth.

Dated: January 29, 1996.

Respectfully submitted,

/s/ CHUCK R. GARDNER
Attorney at Law
815 South Third Street
Las Vegas, NV 89101

**APPENDIX E**

[Filed May 16, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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WRIT OF PROHIBITION

TO: The Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, The Honorable Charles E. Springer, Associate Justice, The Honorable David Zenoff, Senior Justice, and Herbert J. Ahlswede:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are directed to cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

WITNESS The Honorable S. Cliff Young, Miriam Shearing and Robert E. Rose, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 25th day of April, 1996.

[Seal] /s/ JANETTE M. BLOOM
Supreme Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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RETURN OF SERVICE

**STATE OF NEVADA** )
) **ss.**
**CARSON CITY** )

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for Chief Justice Thomas Steffen, by showing her an original of the

within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

IN THE SUPREME COURT
OF THE STATE OF NEVADA

---

Case No. 27847

---

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
*Petitioner*,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents*.

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RETURN OF SERVICE

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for Justice Charles Springer, by showing her an original of the within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27847

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NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
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THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

*Respondents.*

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RETURN OF SERVICE

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for David Zenoff, Senior Justice of the Nevada Supreme Court, by showing her an original of the within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

**APPENDIX F**

[Filed Jul. 22, 1993]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 24598

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IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

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CONFIDENTIAL ORDER

Petitioner the Honorable Jerry Carr Whitehead having filed a petition for a writ of prohibition or in the alternative for a writ of mandamus directed to the respondent Nevada Commission on Judicial Discipline; and it appearing that petitioner has set forth issues of arguable merit and that petitioner has no plain, speedy and adequate remedy in the ordinary course of law; and good cause appearing therefor;

IT IS HEREBY ORDERED that pending the determination of this petition on its merits, all proceedings before and actions of the Nevada Commission on Judicial Discipline and the actions of those acting on behalf of the Commission relating to this matter, including the filing of an answer to a purported "complaint," the holding of a hearing to determine probable cause, and the conducting of any further investigative activities, are stayed.

IT IS HEREBY FURTHER ORDERED that the Commission shall forthwith, and in any event no later than August 2, 1993, provide to petitioner a list of all persons outside the members of the Commission who have been

contacted by any person purporting to act with the authority of the Commission and advised of the pendency of an "investigation" or "proceeding" against petitioner, and all other matters required to be disclosed pursuant to ARJD 14(5), and to advise each of such persons who may have been noticed to appear at a probable cause hearing that they should not do so pending further notice;

IT IS HEREBY FURTHER ORDERED that the Commission, its members, and all persons purporting to act pursuant to their authority, shall maintain strict confidentiality concerning any alleged investigation or proceeding and the pendency of this action seeking an extraordinary writ in accordance with ARJD 5;

IT IS HEREBY FURTHER ORDERED that all proceedings before this court shall remain strictly confidential, and that the petition and all other documents, exhibits and pleadings related thereto, as well as any further documents submitted for filing in this matter, shall be filed under seal and shall contain the caption as set forth in this order. All documents shall be submitted for filing by delivering them personally to the clerk of this court Janette Bloom or the chief deputy clerk Jeanne Richards.

IT IS HEREBY FURTHER ORDERED the Commission shall have thirty (30) days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ. In the answer, the Commission shall explain the authority by which it has summoned non-complaining witnesses before a finding of probable cause has been made and thereby, of necessity, violating the confidentiality of the proceedings before the Commission.

/s/ STEFFEN, A.C.J.

cc: Hon. Frankie Sue Del Papa, Attorney General
Brooke Nielsen, Deputy Attorney General
Donald J. Campbell
Guy Shipler, Chairman, Nevada Commission on Judicial Discipline

## APPENDIX G

## AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JERRY CARR WHITEHEAD

An investigation into alleged acts of wrong doing by Jerry Carr Whitehead has been conducted by the United States; and

Jerry Carr Whitehead has decided to retire from judicial office effective January 15, 1996, and resume the practice of law; he will officially send notice of his retirement within seven (7) days of the date of this document; and

The Government has determined that the interests of justice will be achieved by the decision of Jerry Carr Whitehead to retire from judicial office;

Therefore, in consideration of the representations set forth above, and as a settlement of the issues encompassed within the federal investigation of Jerry Carr Whitehead, it is agreed as follows:

1. The Government will not seek to prosecute Jerry Carr Whitehead for any alleged acts of wrongdoing encompassed within its investigation of Jerry Carr Whitehead of which the Government has notice at the time of the execution of this agreement.

2. The Government has relied upon the representations of Jerry Carr Whitehead that he will retire and, upon retirement, will not seek reelection, and will not serve in any state judicial capacity; in the event that Jerry Carr Whitehead fails to act in accordance with these representations, this agreement shall be null and void, and the Government will be free, in its discretion, to

pursue any action it deems appropriate concerning Jerry Carr Whitehead.

3. Jerry Carr Whitehead expressly agrees that by entering into this agreement he is waiving any rights he would otherwise have had due to the lapse of time between the date of execution of this agreement and January 15, 1997, including any claims to the benefits of any applicable statute of limitations, rights to a speedy trial, or other rights which would accrue to him due to the passage of time.

4. Jerry Carr Whitehead and the United States make no promises of confidentiality of this document.

5. I hereby state that the above has been read and explained to me by my attorney. I understand the conditions of this agreement and I will comply with them.

/s/ JERRY CARR WHITEHEAD — August 14th, 1995 DATE

/s/ MICHAEL G. DOWD
Counsel for JERRY CARR WHITEHEAD — Aug 8, 1995 DATE

/s/ DOUGLAS N. FRAZIER
Special Attorney to the United States Attorney General in the District of Nevada — Aug 7, 1995 DATE